November 27, 2011

Mr. Henry Breiteneicher
Associate Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570-0001

Subject: **Motion for Reconsideration, Charging Party's Opposition to Informal Settlement without remand to Minimum 3-Member Board Quorum**

Reference: **Local 687 & Michigan Regional Council of Carpenters (MRCC) (Convention & Show Services, Inc.) and Michael Johnston; Case No. 07-CB-15293**

Dear Mr. Breiteneicher,

Enclosed herein, please find Charging Party Michael Johnston's Motion for Reconsideration on the aforementioned matter as noted above.

Sincerely,

William T. Doherty

Cc: File

Charging Party via std. US MAIL
Secretary of Labor Hilda Solis

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD – REGION 7

LOCAL 687, MICHIGAN REGIONAL COUNCIL OF CARPENTERS
(CONVENTION & SHOW SERVICES, INC.), CASE NO. 07-CB-15293

Respondent,

And;

MICHAEL JOHNSTON

Charging Party

CHARGING PARTY'S MOTION FOR RECONSIDERATION, PETITION FOR ENFORCEMENT TO REMAND CASE TO 3-MEMBER MINIMUM BOARD QUORUM PER SUPREME COURT RULING, OPPOSITION TO INFORMAL SETTLEMENT AGREEMENT.

Charging Party, by and through his appointed representative William T. Doherty, submit the following as his opposition to informal settlement and the Region 7 Director's refusal to resubmit the case to the minimum 3-member Board Quorum, per specific direction by the United States Supreme Court, per their decision and order issued June 17, 2010 in New Process Steel.

INTRODUCTION & BACKGROUND FACTS:

The charging party submits for the record as follows:

1. The entire record of this case as noted within the NLRB.GOV website, each and every record submitted to date as shown by enclosed **(EXHIBIT "A").**, PAGES 1, 2 & 3 CASE DOCKET.; and those not specifically listed and/or withheld from the client and not showing on the NLRB's Official electronic record, and yet subject to further discovery, document turn-over and adequate time for rebuttal – when illegally with-held from the Charging Party.
2. Pitt, McGee Palmer Rivers & Golden Opposition to Informal Settlement Agreement, pages 1-16 of 97 total, date June 2, 2011 (remaining pages were specific exhibits, which are incorporated by reference herein as though printed in full), items 1-50 inclusive, marked as **EXHIBIT "B".**
3. **Local 687, Michigan Regional Council of Carpenters (MRCC)(Convention & Show Services, Inc.) and Michael Johnston.** Case No. 07-CB-15293, July 31, 2008 "Decision & Order". Pages 1016 to 1021, marked as **EXHIBIT "C".** The Charging Party notes that under the BOARD ORDER dated July 31, 2008,

the MRCC & Local 687 were "ordered" to turn over any & all items per Part 2 (a) & (b) in order that the Board or its Agents and the Charging Party could assess the proper amounts due to the class of discriminates for the 13-Month period as so defined by the ALJ, Paul Bogas.

COMPARATOR EARNINGS:

4. The Make Whole Remedy, per the "ORDER" was on for Comparator Earnings of the Charging Party Johnston, first and foremost and the remaining 385-400 members discriminated against during that same time period. Thus, the Board and its Region 7 Director, in order to comply with the directive of the ALJ, Paul Bogas, had but 2-choices....gather and submit all the information for Comparator Earnings for every Member of the Michigan Regional Council of Carpenters, which includes some 14,000+ members, or, gather & submit the records for Comparator Earnings of those within Mr. Johnston's own local – Local 687, less the class of 400-Discriminatees and "compare" the two groups wages and benefits earned during the period found by the ALJ to require the MAKE Whole Remedy. Predicated upon the average hourly wage and benefit scale paid during the Make Whole period of 13-months, each discriminate on average would have earned $58,000 in wages and benefits minimum, for a total maximum due of $22,470,00 dollars, subject to "interim earnings" of each effected member suffering the discrimination, less taxes during the 13-month period, which would be the subject of one or more Compliance Specification proceedings to be brought before the ALJ Paul Bogas; and which of necessity would produce a specific listing of names, total amount due, interest accrued, intervening wages, taxes to be with-held and net payment due to each discriminate.

This is all but simple math and there are therefore no legitimate excuses for Region 7 not fail to comply with the directive of the ALJ & Board, but for the apparent collusion and fraudulent intent of the UBC & Regional Council Attorneys to pull a fast one because the lead plaintiff proceeded "pro-se".

These are the exact kind of rank & file workers and employees the Act was designed to protect...those who sweat & toil in the factories, the mines, the construction industry, etc. That this process may take time is without question. That it is not the proper course of action, given the explicit ruling of the ALJ, the subsequent D & O by the Board and the specific purpose of NLRA Section 7 and the subsequent amendment via LMRDA (1959), providing the rank & file member the right to "refrain" from any & all activity cannot be questioned on fact or the law as it has long been settled law.

The Region 7 Directors back-door confidentiality agreement with the counsel for the MRCC, per the normal construction of both State & Federal Rules of Civil Procedure, wherein the lead Plaintiff was excluded from any & all Settlement Negotiations smacks of collusion and fraudulent intent on the part of Board Agents who are attorneys sworn to uphold the law, not circumvent the law(s). Moreover, their actions amount to a de-facto reversal of both the Administrative Law Judges authority to act; and, to issue Decisions and Orders under the Act and also serve as a de-facto reversal of the Board's own Decision & Order which issued July 31, 2008.

ORDINARY, CONTEMPORARY, COMMON MEANING, SECTION 7 – "REFRAIN"

5. RIGHTS OF EMPLOYEES - Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, **and shall also have the right to refrain from any or all such activities** except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]. Mr. Johnston has complied with his membership obligations as related to his payment of initiation fees when joining the Union in the first instance and in his payment of Due obligations and maintenance of membership is not in issue under 8(a)(3). However, once he has complied with those rights, the portion of 7 noted above in bold..."and shall also have the right to refrain from any or all such activities", as found by both the ALJ Paul Bogas and the Board (Liebman & Schaumber), his employment rights and his membership obligations are separate under Board, Appellate Court & Supreme Court precedent. Furthermore, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" *Perrin* v. *United States,* 444 U.S. 37. 42 (1979) – as directly cited by the "Brief for the Solicitor General, February 2010, page 16, New Process Steel, Case No. 08/1457. In the instant matter of Local 687 & Michael Johnston, his right and the right of the entire class of 385-400 additional members thus discriminated against in hiring from the non-exclusive Hiring Hall to "refrain" cannot be challenged. As defined by Webster's, New World Dictionary, The American language, College Edition, copyright 1959, and published the same year as the LMRDA changes went into effect – "refrain" is a verb intransitive, defined as "to hold back, keep oneself from" and in the context bolded above "any & all activities" following immediately after "refrain from" is plain and clear for the everyman to see and to comprehend without further explanation.

ORAL VESES WRITTEN COMPLAINTS:

6. In a recent case by the United States Supreme Court, in re: Kasten v. St Gobain, decided 3-22-11 Sup Ct (excerpt), the subject matter of re: Fair Labor Standards Act (FLSA) 1938...'Oral vs. written complaints', the Court stated:

"Several functional considerations indicate that Congress intended the antiretaliation provision to cover oral, as well as written, "complaint[s]." First, an interpretation that limited the provision's coverage to written complaints would undermine the Act's basic objectives".

"The Act seeks to prohibit "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U. S. C. §202(a). It does so in part by setting forth substantive wage, hour, and overtime standards. It relies for enforcement of these standards, not upon "continuing detailed federal supervision or inspection of payrolls," but upon "information and complaints received from employees seeking to vindicate rights claimed to have been denied." Mitchell v. Robert DeMario Jewelry, Inc., 361 U. S.

288, 292 (1960). And its antiretaliation provision makes this enforcement scheme effective by preventing "fear of economic retaliation" from inducing workers "quietly to accept substandard conditions." Ibid."

In the instant matter of Mr. Johnston and the additional 385-400 members thus discriminated against in Hiring for the 13-month period defined by the ALJ Paul Bogas and upheld by the NLRB Board – the same questions present, and thus the same anti-retaliation provisions were "ordered" to be implemented to prevent any recurrence of "ECONOMIC RETALIATION" LASTING 13-months. For a government employee of a regional Office of the Board, the economic "black-balling or black-listing" as a form of retaliation from choosing to engage the Protections afforded by Section 7 of the NLRA mean little, as Board Agents and Attorneys live in and operate in a much different world than those who ply their craft within the often hostile, unruly and criminal Construction Industry. The economic starvation, intentional black-balling/black-listing go on far past the day the Board Agent/Attorneys leave and the effects to those thus intentionally discriminated against linger far past the periods defined in the suit and in certain cases, as the lead party can attest, the effects can and do last for years and also serve as a career ender, particularly in the Construction Trades and specifically in the United Brotherhood of Carpenters and Joiners of America.

Moreover, counsel for the MRCC readily admits that its Contractors maintain lists of names with the acronym "DNH" (DO NOT HIRE) placed adjacent thereto, and as anyone in this racket comprehends fully, that discriminatory tactic is plied by both sides – The Michigan Regional Council of Carpenters (MRCC) and UBCJA Local 687, and it is used to further erode the complaining members Section 7 Rights. The UBCJA International General Presidents brand any and persons within the United Brotherhood of Carpenters, as "deranged loners and commie's" and in the instant matter here, the apple does not fall far from the tree. The MRCC Executive Secretary Treasurer and his appointed Business Agents/Representatives employ the exact same tactics on so called dissidents. A man or woman within the UBC who stands up for his or her rights is certainly not a dissident, nor is he or she a deranged commie or loner – yet the MRCC Counsel of Record, Dennis Devaney & Jeffrey D. Wilson made this argument to the Region 7 Director, stating "Also, many employers have "do not hire" lists, which were strictly followed by MRCC." REF: July 11, 2011 MRCC's response to Charging Party's Opposition to Informal Settlement, pg. 4, par. 3.

While counsel for MRCC attempt to feign clean hands here, both Local 687 & MRCC employ the exact same tactics when considering members for employment in the first instance. Filing any suit or any claim with the any Regional Office of the NLRB earns you a lifetime "DNH" Tag adjacent to your Name and your UBC – "U"-Number for all to see, whether identified or not on the UBC's ULTRA System. The Locals Business Agents and the MRCC's executives certainly know who these people are and they can and do make certain to have the Signatory Contractors add the rank & files members names to their Hall of Fame list, for all "DON NOT HIRE'S". At this point in time, your career as a Union Carpenter is all but done. The fact remains, that the MRCC & the Local Union control the right to hire & fire on both sides of the fence and they play the Court's and the Board and Regional Directors for fools – with their flat out lies put forth on the record.

KASTEN v. ST. GOBAIN – cont. -

"Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers? President Franklin Roosevelt pointed out at the time that these were the workers most in need of the Act's help. See Message to Congress, May 24, 1937, H. R. Doc. No. 255, 75th Cong., 1st Sess., 4 (seeking a bill to help the poorest of "those who toil in factory")".

The simple facts are: The UBCJA International, as the parent entity is fully versed and aware of every suit filed against any Regional/District Council and/or Local Union subordinate to it. The UBCJA is and has pushed the illegal fines & assessments in all of its Regional & District Councils and it needs to squash and/or bury this case to further its illegitimate and corrupt aims in each of the remaining 35 Regions subordinate to it. The Region 7 Director is fully aware of these aims, pointed squarely at Section 7 rights and colluded with the UBCJA & MRCC Counsel of Record to bury this case swiftly and cheaply and in fact wipe it off the books as if it never existed. The UBCJA has spent $200M dollars over the last 20-years on lawsuits designed primarily to shred the NLRA, LMRA & LMRDA and eviscerate the protections of these laws, afforded as A Federal right so the Dictatorial programs and autocratic fiat of one man, and his corrupt aims can rob the membership blind with the Boards blessing and with the direct participation of its regional attorneys.

The $300,000 behind closed doors settlement does nothing to comply with the direct orders of the ALJ & the Board and it is a slap in the face to the Charging Party Mr. Johnston and the remaining 385-400 members discriminated against for the immediate 13-month period. At the proposed value of $750.00 per individual, spread over 13-months the gross income per man/woman discriminated against equates to $57.69 per month, or - $13.29 per week, hardly what the ALJ, Paul Bogas had in mind when fashioning the remedy he ordered, nor does it comport with the Boards own Decision & Order wherein, the Board stated – "ORDER" – "The National Labor Relations Board adopts the recommended Order of the administrative law [j]udge and orders that the Respondent, Local 687, Michigan Regional Council of Carpenters, Detroit, MI, it officers, agents, and representatives shall take the action set forth in the order".

As we are all aware, shall is "mandatory", while "may" is discretionary. Nowhere within the ALJ's order did he direct or state that The Regional Director & the MRCC Counsel of Record could enter into and arbitrary, capricious and binding Confidentiality Agreement which by its very design is designed to thwart justice and shred the Act in one fell swoop. The damage to the class of those wrongly discriminated is both long lasting and permanent in nature once a published list of discriminates names is made available. Each one will be surely labeled a dissident, a troublemaker and each shall forever have the "DNH" applied next to their name – whether they solicit work themselves or whether they go through the UBC's phony ULTRA Hiring Hall system.

ALJ Paul Bogas properly found the make whole period for those wrongly discriminated was 13-months. Counsel for the MRCC and the Regional Director for Region 7 have wrongly assumed that their authority supersedes that of the Judge Paul Bogas and they have made a Unilateral decision that ALJ Bogas did not mean to say the Make Whole Period was 13-months, or 56.49 Weeks, but

he really meant to say it was for 24/40th's or 60% of one work week, and they have Unilaterally decided ALJ Paul Bogas really meant the MAKE WHOLE PERIOD encompassed 24-Hours per man/woman wrongly discriminated and that payment to each of this paltry sum would suffice to make them whole.

The MRCC failed to issue a Motion to Show Cause to demonstrate to the Judge why their de-facto reversal of his decision & order and the Boards, which was executed in direct collusion with the Region 7 Attorneys should stand as a matter of law and why it should be upheld. Both parties are guilty here for taking advantage of a pro-se litigant who quite frankly needs the protection of the Region and the Board over and above a sophisticated Corporate & Legal entity such as is present here, yet – the Region 7 Director, also an attorney and one who should uphold the law on behalf of the Charging Party in the instant matter, instead aligns himself with the lawyers for the party found guilty in the matter by both the ALJ & by the National Labor Relations Board.

This so called remedy does nothing to "make whole" any of the those discriminated against as ordered by ALJ Paul Bogas and by the Board Members Liebman & Schaumber. In essence, this paltry settlement is being forced upon the Charging Party and the class behind him without his participation or knowledge, behind closed doors and it smacks of collusion and fraud all around and leaves the Board Agents and Attorneys suspect for foul play and bribe taking, for no competent Attorney in private practice, would accept such a paltry sum without some form of illegal activity occurring. This is beyond the pale, beyond common sense and without legal precedent. It does nothing to effectuate the policies of the Act, to expunge the current illegal behavior or to prevent further illegal behavior and in fact –it only encourages more of the same. Moreover, the former counsel has admitted that he has had express conversations with Board Attorneys who were told to bury this case by the White House, hence his subsequent recusal if you will. And, during the same conversation, the former Attorney mentioned that the UBCJA proposed a quid-pro-quo in the form of a $5M PAC contribution for the upcoming 2012 run of the Obama administration, directly from the UBCJA.

NEW PROCESS STEEL, BRIEF FOR THE SOLICITOR GENERAL, pg. 23 FEB. 2010

7. "19. Amicus Michigan Regional Council of Carpenters (MRCC) argues (Amicus Br. 4-5) that the Board's Delegation of authority to a three-member group consisting of Members Liebman, Schaumber, and Kirsanow was illegal from the start because the Board knew at the time that members Kirsanow's term would soon expire, leaving the delegee group with only two members"...In any case, petitioner did not challenge the validity of the Board's initial delegation to a three-member group in either its petition for a writ of certiorari or its brief as petitioner; amici may not assert that challenge in petitioner's stead."

Of course, now that the 2-member NLRB Board decision and order was Vacated in on September 20, 2010, and the UBCJA, MRCC & Local 687 and their Insurers and Re-Insurers have executed an illegal back-room deal with Board Attorneys, saving them some Twenty Two Million, One Hundred and seventy Thousand Dollars ($22,170,000), or Fifty-Five Thousand, Four Hundred and Twenty-Five dollars ($55,425) per member discriminated against during the 13-month Make

Whole Period ordered by the ALJ & the 2-Member Board, all is fair and the purposes of the Act have been served, while those discriminated against in the short term period of 13-months can expect to receive a massive recovery of $13.29 per week, or $750.00 in income for 13-months. The decision by the Region 7 Director and the MRCC Counsel of Record reeks of corruption and should be summarily investigated by the United States Department of Justice, the Office of Inspector General (OIG) and the FBI. Given the negotiations have occurred through the mail and the wire services and crossed state lines – criminal RICO charges should also be pursued, as should charges with the appropriate state bar associations for the participating attorneys on both sides.

At pg. 33, New Process Steel, Case No. 08-1457 the Solicitor General argued..."At the very least, the judgment of the Board as to the meaning of the statute it enforces is entitled to the kind of judicial deference owed to agency actions having persuasive authority. ***Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)** ("The weight [accorded to an administrative] in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.")

In the instant matter of the Charging Party, Michael Johnston and those standing with him, numbering between 385-400 members discriminated against, the Four-Prong Test above, as stated in Skidmore & Swift – the Region 7 Director afforded no thoroughness and none was evident in its consideration, there was no validity to its alleged reasoning, nor were there any legal or factual basis cited, there is no consistency with earlier and later pronouncements [Decisions & Orders of the Board] and there are no factors which give Region 7 the power to persuade anyone, less those who come into their office on a Pro-Se basis and whom do not know any better. Unfortunately for Region 7, we do.

Finally, the fourth Prong..."if lacking power to control", that Test, being the Power to Control was amply and swiftly disposed of by the United States Supreme Court in its Decision and Order to the Board in New Process Steel, dated June 17, 2010. **(EXHIBIT "D")**

NEW PROCESS STEEL, UNITED STATES SUPREME COURT – JUNE 17, 2010

NEW PROCESS STEEL, L. P. *v.* NATIONAL LABOR RELATIONS BOARD

Certiorari to the United States court of appeals for the seventh circuit

No. 08-1457. Argued March 23, 2010--Decided June 17, 2010

The Taft-Hartley Act increased the size of the National Labor Relations Board (Board) from three members to five, see 29 U. S. C. §153(a), and amended §3(b) of the National Labor Relations Act to increase the Board's quorum requirement from two members to three and to allow the Board to delegate its authority to groups of at least three members, see §153(b). In December 2007, the Board--finding itself with only four members and expecting two more vacancies--delegated, *inter alia,* its powers to a group of three members. On December 31, one group member's appointment

expired, but the others proceeded to issue Board decisions for the next 27 months as a two-member quorum of a three-member group. Two of those decisions sustained unfair labor practice complaints against petitioner, which sought review, challenging the two-member Board's authority to issue orders. The Seventh Circuit ruled for the Government, concluding that the two members constituted a valid quorum of a three-member group to which the Board had legitimately delegated its powers. ***Held:*** **Section 3(b) requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board. Pp. 4-14.**

(a) The first sentence of §3(b), the so-called delegation clause, authorizes the Board to delegate its powers only to a "group of three or more members." This clause is best read to require that the delegee group *maintain* a membership of three in order for the delegation to remain valid. First, that is the only way to harmonize and give meaningful effect to all of §3(b)'s provisions: (1) the delegation clause; (2) the vacancy clause, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board"; (3) the Board quorum requirement, which mandates that "three members of the Board shall, at all times, constitute a quorum of the Board"; and (4) the group quorum provision, which provides that "two members shall constitute a quorum" of any delegee group. This reading is consonant with the Board quorum requirement of three participating members "at all times," and it gives material effect to the delegation clause's three-member rule. It also permits the vacancy clause to operate to provide that vacancies do not impair the Board's ability to take action, so long as the quorum is satisfied. And it does not render inoperative the group quorum provision, which continues to authorize a properly constituted three-member delegee group to issue a decision with only two members participating when one is disqualified from a case. The Government's contrary reading allows two members to act as the Board *ad infinitum*, dramatically undercutting the Board quorum requirement's significance by allowing its permanent circumvention. It also diminishes the delegation clause's three-member requirement by permitting a *de facto* two-member delegation. By allowing the Board to include a third member in the group for only one minute before her term expires, this approach also gives no meaningful effect to the command implicit in both the delegation clause and the Board quorum requirement that the Board's full power be vested in no fewer than three members. Second, had Congress intended to authorize two members to act on an ongoing basis, it could have used straightforward language. The Court's interpretation is consistent with the Board's longstanding practice of reconstituting a delegee group when one group member's term expired. Pp. 4-9.

(b) The Government's several arguments against the Court's interpretation--that the group quorum requirement and vacancy clause together permit two members of a three-member group to constitute a quorum even when there is no third member; that the vacancy clause establishes that a vacancy in the *group* has no effect; and that reading the statute to authorize the Board to act with only two members advances the congressional objective of Board efficiency--are unconvincing. Pp. 9-14.

564 F. 3d 840, reversed and remanded.

Stevens, J., delivered the opinion of the Court, in which *Roberts, C. J.*, and *Scalia, Thomas,* and *Alito, JJ.*, joined. *Kennedy, J.*, filed a dissenting opinion, in which *Ginsburg, Breyer,* and *Sotomayor, JJ.*, joined.

NEW PROCESS STEEL, L. P., PETITIONER *v.*
NATIONAL LABOR RELATIONS BOARD

on writ of certiorari to the united states court of appeals for the seventh circuit

[June 17, 2010]

Justice Stevens **delivered the opinion of the Court.**

The Taft-Hartley Act, enacted in 1947, increased the size of the National Labor Relations Board (Board) from three members to five. See 29 U. S. C. §153(a). Concurrent with that change, the Taft-Hartley Act amended §3(b) of the National Labor Relations Act (NLRA) to increase the quorum requirement for the Board from two members to three, and to allow the Board to delegate its authority to groups of at least three members. See §153(b). The question in this case is whether, following a delegation of the Board's powers to a three-member group, two members may continue to exercise that delegated authority once the group's (and the Board's) membership falls to two. **We hold that two remaining Board members cannot exercise such authority.**

I

As 2007 came to a close, the Board found itself with four members and one vacancy. It anticipated two more vacancies at the end of the year, when the recess appointments of Members Kirsanow and Walsh were set to expire, which would leave the Board with only two members--too few to meet the Board's quorum requirement, §153(b). The four sitting members decided to take action in an effort to preserve the Board's authority to function. On December 20, 2007, the Board made two delegations of its authority, effective as of midnight December 28, 2007. First, the Board delegated to the general counsel continuing authority to initiate and conduct litigation that would normally require case-by-case approval of the Board. See Minute of Board Action (Dec. 20, 2007), App. to Brief for Petitioner 4a-5a (hereinafter Board Minutes). Second, the Board delegated "to Members Liebman, Schaumber and Kirsanow, as a three-member group, all of the Board's powers, in anticipation of the adjournment of the 1st Session of the 110th Congress." *Id.*, at 5a. The Board expressed the opinion that its action would permit the remaining two members to exercise the powers of the Board "after [the] departure of Members Kirsanow and Walsh, because the remaining Members will constitute a quorum of the three-member group." *Ibid.*

The Board's minutes explain that it relied on "the statutory language" of §3(b), as well as an opinion issued by the Office of Legal Counsel (OLC), for the proposition that the Board may use

this delegation procedure to "issue decisions during periods when three or more of the five seats on the Board are vacant." *Id.*, at 6a. The OLC had concluded in 2003 that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." Dept. of Justice, OLC, Quorum Requirements, App. to Brief for Respondent 3a. In seeking the OLC's advice, the Board agreed to accept the OLC's answer regarding its ability to operate with only two members, *id.*, at 1a, n. 1, and the Board in its minutes therefore "acknowledged that it is bound" by the OLC opinion. Board Minutes 6a. The Board noted, however, that it was not bound to make this delegation; rather, it had "decided to exercise its discretion" to do so. *Ibid.*

On December 28, 2007, the Board's delegation to the three-member group of Members Liebman, Schaumber, and Kirsanow became effective. On December 31, 2007, Member Kirsanow's recess appointment expired. Thus, starting on January 1, 2008, Members Liebman and Schaumber became the only members of the Board. They proceeded to issue decisions for the Board as a two-member quorum of a three-member group. The delegation automatically terminated on March 27, 2010, when the President made two recess appointments to the Board, because the terms of the delegation specified that it would be revoked when the Board's membership returned to at least three members, *id.*, at 7a.

During the 27-month period in which the Board had only two members, it decided almost 600 cases. See Letter from Elena Kagan, Solicitor General, to William K. Suter, Clerk of Court (Apr. 26, 2010). One of those cases involved petitioner New Process Steel. In September 2008, the two-member Board issued decisions sustaining two unfair labor practice complaints against petitioner. See *New Process Steel, LP*, 353 N. L. R. B. No. 25 (2008); *New Process Steel, LP*, 353 N. L. R. B. No. 13 (2008). Petitioner sought review of both orders in the Court of Appeals for the Seventh Circuit, and challenged the authority of the two-member Board to issue the orders.

The court ruled in favor of the Government. After a review of the text and legislative history of §3(b) and the sequence of events surrounding the delegation of authority in December 2007, the court concluded that the then-sitting two members constituted a valid quorum of a three-member group to which the Board had legitimately delegated all its powers. 564 F. 3d 840, 845-847 (CA7 2009). On the same day that the Seventh Circuit issued its decision in this case, the Court of Appeals for the District of Columbia announced a decision coming to the opposite conclusion. *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB,* 564 F. 3d 469 (2009). **We granted certiorari to resolve the conflict.[1] 558 U. S. ___ (2009).**

II

The Board's quorum requirements and delegation procedure are set forth in §3(b) of the NLRA, 49 Stat. 451, as amended by 61 Stat. 139, which provides:

"The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. ... A vacancy in the Board shall not impair the right of the

remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." 29 U. S. C. §153(b).

It is undisputed that the first sentence of this provision authorized the Board to delegate its powers to the three-member group effective on December 28, 2007, and the last sentence authorized two members of that group to act as a quorum of the group during the next three days if, for example, the third member had to recuse himself from a particular matter. **The question we face is whether those two members could continue to act for the Board as a quorum of the delegee group after December 31, 2007, when the Board's membership fell to two and the designated three-member group of "Members Liebman, Schaumber, and Kirsanow" ceased to exist due to the expiration of Member Kirsanow's term. Construing §3(b) as a whole and in light of the Board's longstanding practice, we are persuaded that they could not.**

The first sentence of §3(b), which we will call the delegation clause, provides that the Board may delegate its powers only to a "group of three or more members." 61 Stat. 139. There are two different ways to interpret that language. One interpretation, put forward by the Government, would read the clause to require only that a delegee group contain three members at the precise time the Board delegates its powers, and to have no continuing relevance after the moment of the initial delegation. Under that reading, two members alone may exercise the full power of the Board so long as they were part of a delegee group that, at the time of its creation, included three members. The other interpretation, by contrast, would read the clause as requiring that the delegee group *maintain* a membership of three in order for the delegation to remain valid. Three main reasons support the latter reading.

First, and most fundamentally, reading the delegation clause to require that the Board's delegated power be vested continuously in a group of three members is the only way to harmonize and give meaningful effect to all of the provisions in §3(b). See *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (declining to adopt a "construction of the statute, [that] would render [a term] insignificant"); *Market Co.* v. *Hoffman*, 101 U. S. 112, 115-116 (1879) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be ... insignificant" (internal quotation marks omitted)). Those provisions are: (1) the delegation clause; (2) the vacancy clause, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board"; (3) the Board quorum requirement, which mandates that "three members of the Board shall, at all times, constitute a quorum of the Board"; and (4) the group quorum provision, which provides that "two members shall constitute a quorum" of any delegee group. See §153(b).

Interpreting the statute to require the Board's powers to be vested at all times in a group of at least three members is consonant with the Board quorum requirement, which requires three participating members "at all times" for the Board to act. The interpretation likewise gives material effect to the three-member requirement in the delegation clause. The vacancy clause still operates to provide that vacancies do not impair the ability of the Board to take action, so long as

the quorum is satisfied. And the interpretation does not render inoperative the group quorum provision, which still operates to authorize a three-member delegee group to issue a decision with only two members participating, so long as the delegee group was properly constituted. Reading §3(b) in this manner, the statute's various pieces hang together--a critical clue that this reading is a sound one.

The contrary reading, on the other hand, allows two members to act as the Board *ad infinitum*, which dramatically undercuts the significance of the Board quorum requirement by allowing its permanent circumvention. That reading also makes the three-member requirement in the delegation clause of vanishing significance, because it allows a *de facto* delegation to a two-member group, as happened in this case. Under the Government's approach, it would satisfy the statute for the Board to include a third member in the group for only one minute before her term expires; the approach gives no meaningful effect to the command implicit in both the delegation clause and in the Board quorum requirement that the Board's full power be vested in no fewer than three members. Hence, while the Government's reading of the delegation clause is textually permissible in a narrow sense, it is structurally implausible, as it would render two of §3(b)'s provisions functionally void.

Second, and relatedly, if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language. Congress instead imposed the requirement that the Board delegate authority to no fewer than three members, and that it have three participating members to constitute a quorum. Those provisions are at best an unlikely way of conveying congressional approval of a two-member Board. Indeed, had Congress wanted to provide for two members alone to act as the Board, it could have maintained the NLRA's original two-member Board quorum provision, see 29 U. S. C. §153(b) (1946 ed.), or provided for a delegation of the Board's authority to groups of two. **The Rube Goldberg-style delegation mechanism employed by the Board in 2007--delegating to a group of three, allowing a term to expire, and then continuing with a two-member quorum of a phantom delegee group--is surely a bizarre way for the Board to achieve the authority to decide cases with only two members. To conclude that Congress intended to authorize such a procedure to contravene the three-member Board quorum, we would need some evidence of that intent.**

The Government has not adduced any convincing evidence on this front, and to the contrary, our interpretation is consistent with the longstanding practice of the Board. This is the third factor driving our decision. Although the Board has throughout its history allowed two members of a three-member group to issue decisions when one member of a group was disqualified from a case, see Brief for Respondent 20; Board Minutes 6a, the Board has not (until recently) allowed two members to act as a quorum of a defunct three-member group.[2] Instead, the Board concedes that its practice was to reconstitute a delegee group when one group member's term expired. Brief for Respondent 39, n. 27.[3] That our interpretation of the delegation provision is consistent with the Board's longstanding practice is persuasive evidence that it is the correct one, notwithstanding the Board's more recent view. See *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 214 (1988).

In sum, a straightforward understanding of the text, which requires that no fewer than three members be vested with the Board's full authority, coupled with the Board's longstanding practice, points us toward an interpretation of the delegation clause that requires a delegee group to maintain a membership of three.

III

Against these points, the Government makes several arguments that we find unconvincing. It first argues that §3(b) authorizes the Board's action by its plain terms, notwithstanding the somewhat fictional nature of the delegation to a three-member group with the expectation that within days it would become a two-member group. In particular, the Government contends the group quorum requirement and the vacancy clause together make clear that when the Board has delegated its power to a three-member group, "any two members of that group constitute a quorum that may continue to exercise the delegated powers, regardless whether the third group member ... continues to sit on the Board" and regardless "whether a quorum remains in the full Board." Brief for Respondent 17; see also *id.*, at 20-23.

Although the group quorum provision clearly authorizes two members to act as a quorum of a "group designated pursuant to the first sentence"--*i.e.*, a group of at least three members--it does not, by its plain terms, authorize two members to constitute a valid delegee group. **A quorum is the number of members of a larger body that must participate for the valid transaction of business. See Black's Law Dictionary 1370 (9th ed. 2009) (defining "quorum" as the "minimum number of members ... who must be present for a deliberative assembly to legally transact business"); 13 Oxford English Dictionary 51 (2d ed. 1989) ("A fixed number of members of any body ... whose presence is necessary for the proper or valid transaction of business"); Webster's New International Dictionary 2046 (2d ed. 1954) ("Such a number of the officers or members of any body as is, when duly assembled, legally competent to transact business").** But the fact that there are sufficient members participating to constitute a quorum does not necessarily establish that the larger body is properly constituted or can validly exercise authority.[4] In other words, that only two members must participate to transact business in the name of the group, does not establish that the group itself can exercise the Board's authority when the group's membership falls below three.

The Government nonetheless contends that quorum rules "ordinarily" define the number of members that is both necessary and sufficient for an entity to take an action. Brief for Respondent 20. Therefore, because of the quorum provision, if "at least two members of a delegee group actually participate in a decision ... that should be the end of the matter," regardless of vacancies in the group or on the Board. *Ibid.* But even if quorum provisions ordinarily provide the rule for dealing with vacancies--*i.e.*, even if they ordinarily make irrelevant any vacancies in the remainder of the larger body--the quorum provisions in §3(b) do no such thing. Rather, there is a separate clause addressing vacancies. The vacancy clause, recall, provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." §153(b) (2006 ed.). **We thus understand the quorum provisions merely to define the number of**

members who must participate in a decision, and look to the vacancy clause to determine whether vacancies in excess of that number have any effect on an entity's authority to act.

The Government argues that the vacancy clause establishes that a vacancy in the *group* has no effect. But the clause speaks to the effect of a vacancy in the *Board* on the authority to exercise the powers of the *Board;* it does not provide a delegee group authority to act when there is a vacancy in the group. It is true that any vacancy in the group is necessarily also a vacancy in the Board (although the converse is not true), and that a group exercises the (delegated) "powers of the Board." But §3(b) explicitly distinguishes between a group and the Board throughout, and in light of that distinction we do not think "Board" should be read to include "group" when doing so would negate for all practical purposes the command that
a delegation must be made to a group of at least three members.

Some courts have nonetheless interpreted the quorum and vacancy provisions of §3(b) by analogizing to an appellate panel, which may decide a case even though only two of the three initially assigned judges remain on the panel. See *Photo-Sonics, Inc.* v. *NLRB*, 678 F. 2d 121, 122-123 (CA9 1982). The governing statute provides that a case may be decided "by separate panels, each consisting of three judges," 28 U. S. C. §46(b), but that a "majority of the number of judges authorized to constitute a court or panel thereof ... shall constitute a quorum," §46(d). We have interpreted that statute to "requir[e] the inclusion of at least three judges in the first instance," but to allow a two-judge "quorum to proceed to judgment when one member of the panel dies or is disqualified." *Nguyen* v. *United States*, 539 U. S. 69, 82 (2003). But §46, which addresses the assignment of particular cases to panels, is a world apart from this statute, which authorizes the standing delegation of all the Board's powers to a small group.[5] Given the difference between a panel constituted to decide particular cases and the creation of a standing panel plenipotentiary, which will decide many cases arising long after the third member departs, there is no basis for reading the statutes similarly. Moreover, our reading of the court of appeals quorum provision was informed by the longstanding practice of allowing two judges from the initial panel to proceed to judgment in the case of a vacancy, see *ibid.*, and as we have already explained, the Board's practice has been precisely the opposite.

Finally, we are not persuaded by the Government's argument that we should read the statute to authorize the Board to act with only two members in order to advance the congressional objective of Board efficiency. Brief for Respondent 26. In the Government's view, Congress' establishment of the two-member quorum for a delegee group reflected its comfort with pre-Taft-Hartley practice, when the then-three-member Board regularly issued decisions with only two members. *Id.*, at 24. But it is unsurprising that two members regularly issued Board decisions prior to Taft-Hartley, because the statute then provided for a Board quorum of two. See 29 U. S. C. §153(b) (1946 ed.). Congress *changed* that requirement to a three-member quorum for the Board. As we noted above, if Congress had wanted to allow the Board to continue to operate with only two members, it could have kept the Board quorum requirement at two.[6]

Furthermore, if Congress had intended to allow for a two-member Board, it is hard to imagine why it would have limited the Board's power to delegate its authority by requiring a delegee

group of at least three members. Nor do we have any reason to surmise that Congress' overriding objective in amending §3(b) was to keep the Board operating at all costs; the inclusion of the three-member quorum and delegation provisions indicate otherwise. Cf. Robert's Rules of Order §3, p. 20 (10th ed. 2001) ("The requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons").

IV

In sum, we find that the Board quorum requirement and the three-member delegation clause should not be read as easily surmounted technical obstacles of little to no import. Our reading of the statute gives effect to those provisions without rendering any other provision of the statute superfluous: The delegation clause still operates to allow the Board to act in panels of three, and the group quorum provision still operates to allow any panel to issue a decision by only two members if one member is disqualified. Our construction is also consistent with the Board's longstanding practice with respect to delegee groups. **We thus hold that the delegation clause requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board.**

We are not insensitive to the Board's understandable desire to keep its doors open despite vacancies.[7] **Nor are we unaware of the costs that delay imposes on the litigants.** If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances. **Section 3(b), as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died.**

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered. **(EXHIBIT "E")**

8. In the instant matter of Local 687, Michigan Regional Council of Carpenters (Convention & Show Services, Inc.) and Michael Johnston, Case No. 07-CB-15293, the charging party has many times advanced the argument that Region 7 and its Director follow the Supreme Court Decision and Order in the landmark case above. To date, this case has not been properly remanded back to the Board, per New Process Steel for decision before the 3-Member Minimum Board Quorum. Charging Party Johnston again moves for the Board to put this case on its immediate Agenda and to issue an expedited decision prior to the expiration of the third member (Becker) term this upcoming December, which will without such action leave this remaining case of the 594 cases decided under the ambit of New Process Steel to not be finally adjudicated. Final Adjudication requires no less than Region 7's compliance with the Supreme Court's decision, as the supreme

law of the land. The Regional Director and/or the UBCJA International, their counsel of record and/or the MRCC and their counsel of record cannot circumvent that authority under the Federal Constitution.

The Board and its Regional Agents and Attorneys have a limited quasi-judicial & quasi-legislative role, while the UBCJA & MRCC have a very limited quasi-legislative role, only as related to simple internal union rules. Neither has the requisite role of the Congress to issue back-door or de-facto amendments or changes to the NLRA, LMRA or LMRDA, yet both the United Brotherhood of Carpenters and the Region 7 Director seek to subsume the role of the Congress in effecting a negation of their right to legislate and of the right of the Judiciary – in the instant matter, the Supreme Court to decide the law – and instead, extend their own de-facto changes thereto when neither of the three are so empowered. It bare's of necessity to repeat what Justice Stevens stated... **"Section 3(b), as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died."** Accordingly, we again respectfully request that this matter, CASE No. 07-CB-15293 be placed in the fast-track/accelerated for review by the 3-Member Minimum Board Quorum as ordered by the Supreme Court.

9. Pursuant to Rules 102.24 and 102.50 of the Rules and Regulations of the National Labor Relations Board, the undersigned representative for the charging party, in concert with the yet unidentified class of 500-discriminatee's found by Region 7's Director Steven Glasser (June 22, 2011 memorandum), urges the Board, in light of the Supreme Court's decision in New Process Steel, LP v. NLRB, 130 Sup. Ct. 2635 (June 17, 2010), to again deny Carpenters Local 687 and Michigan Regional Council of Carpenters (MRCC) de-facto Motion for Summary judgment, yet submitted properly per the rules of civil procedure; and, instead we respectfully request the General Counsel & the Board to re-instate their initial demand for a decision to issue per a properly constituted minimum 3-Member Board quorum (note 19, page 16 of the Solicitor General's reference contained within MRCC's Amici brief, copy of which has been denied to charging party since being submitted).

We further request that the Board issue to the Respondent, Carpenters Local 687 & the Michigan Regional Council of Carpenters (MRCC) a Notice to Show cause why the Supreme Court's decision in New Process Steel should not be followed by Local 687, MRCC and the Board in the instant matter.

Without the issuance of a Supplemental Decision and Order from the Board which comports to the specific directives of the United States Supreme Court, per New Process Steel, Case No. 07-CB-15293 has not and cannot be finally adjudicated. Once that occurs, then and only then can the Compliance Specification portion of ALJ's Paul Bogas decision and order be had.

On July 11, 2011, counsel for the MRCC issued a general denial insufficient to refute the allegations pertaining to the gross back-pay calculations ordered by ALJ Paul Bogas for the entire 13-month period which by design would make both the discriminates whole as well as make the benefit funds whole. The alternative figures provided have no basis in fact, law or reality and the data in issue required for an accurate determination of Gross Back-Pay due is entirely within its control, which it denies, albeit wrongly. We urge the General Counsel and the Board to rule that the MRCC's much delayed and farcical response cannot and does not meet the requirements of

Section 102.56 (b) & (c) of the Board's Rules and Regulations. We further urge the General Counsel and the Board defer this issue to the Compliance Specification stage under the watchful eye of the ALJ, Paul Bogas to ensure that the pro-se charging party and the entire class of discriminates which the Act was designed to protect, sees the light of day – and that doing so will further the Act itself and the Policies of the United States as noted within the preamble to the NLRA (1935).

The Supreme Court's decision and order in New Process Steel will not alter the legal precedent and all of the factual circumstances put forth in this case and remain irrefutable. However, the issuance of a Final Decision by the 3-Member Board quorum put's the finality to the decision which this precedent case demands.

We respectfully request the Board and its General Counsel to affirm the Administrative Law Judge's decision date July 31, 2008 with the 3-member quorum prior to the expiration of member Becker's term in December 2011 (some 3-1/2 years later), and that the Board remand the case back to the ALJ Paul Bogas, with an express order to detail the list of 500-names with the specific amount due to each discriminate for wages, benefits, interest and furthermore that the MRCC and its insurers/re-insurers be ordered to pay liquidated damages to the Benefit Trust Funds of each claimant on their behalf.

ORAL REQUEST FOR DE-NOVO HEARINGS BEFORE ADMINISTRATIVE LAW JUDGE (ALJ)

In MARSHALL v. JERRICO, INC., 446 U.S. 238 (1980) at II A, the Supreme Court stated:

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. See Carey v. Piphus, 435 U.S. 247, 259 -262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Mathews v. Eldridge, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."...

"The assistant regional administrator simply cannot be equated with the kind of decision makers to which the principles of Tumey and Ward have been held applicable. He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff. If the employer excepts to a penalty - as he has a statutory right to do - he is entitled to a de novo hearing before an administrative law judge. 9 In that hearing the assistant regional administrator acts as the complaining party and bears the burden of proof on contested issues. 29 CFR 580.21 (a) (1979). Indeed, [446 U.S. 238, 248] the Secretary's regulations state that the notice of penalty assessment and the employer's exception "shall, respectively, be given the effect of a

complaint and answer thereto for purposes of the administrative proceeding." 29 CFR 580.3 (b) (1979). It is the administrative law judge, not the assistant regional administrator, who performs the function of adjudicating child labor violations. As the District Court found, the reimbursement provision of 16 (e) is inapplicable to the Office of Administrative Law Judges." 10

"The rigid requirements of Tumey and Ward, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, see Linda R. S. v. Richard D., 410 U.S. 614 (1973), and similar considerations have been found applicable to administrative prosecutors as well, see Moog Industries, Inc. v. FTC, 355 U.S. 411, 414 (1958); Vaca v. Sipes, 386 U.S. 171, 182 (1967). Prosecutors need not be entirely "neutral and detached," cf. Ward v. Village of Monroeville, 409 U.S., at 62 . In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for [446 U.S. 238, 249] securing civil penalties. The distinction between judicial and nonjudicial officers was explicitly made in Tumey, 273 U.S., at 535 , where the Court noted that a state legislature "may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people." See also Hortonville School Dist. v. Hortonville Ed. Assn., 426 U.S. 482, 495 (1976)".

"We do not suggest, and appellants do not contend, that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. Berger v. United States, 295 U.S. 78, 88 (1935). In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. See Dunlop v. Bachowski, 421 U.S. 560, 567 , n. 7, 568-574 (1975); Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939). 11 Moreover, the decision to enforce - or not to enforce - may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. Cf. 2 K. Davis, Administrative Law Treatise 215-256 (2d ed. 1979). A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some [446 U.S. 238, 250] contexts raise serious constitutional questions. See Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); cf. 28 U.S.C. 528 (1976 ed., Supp. III) (disqualifying federal prosecutor from participating in litigation in which he has a personal interest). But the strict requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime".

10. In the instant matter here, relative to the Region 7 NLRB's back-door execution of a Confidentiality Agreement with the Michigan Regional Council of Carpenters (MRCC), which is subordinate to and controlled by the UBCJA International Carpenters Union – the Regional

Director and Breichteneicher took on the roles of an administrative prosecutor and in essence issued a fine to the UBCJA & MRCC verses the strict standards imposed by the quasi-judicial & quasi-legislative role of the National Labor Relations Board under the NLRA (1935) and subsequent amendments thereto.

The charging party has made many oral requests for his due process rights to be enforced by & through the Administrative Law Judge, in the open, per long established Board Rules & Regulations and the ALJ's decision and order, upheld by the 2-member Board without qualification for a full make whole back-pay remedy which can only be had via and by the established Compliance Specification procedures and which require the ALJ's monitoring and supervision to ensure the Due Process rights of the charging party and the remaining class are preserved and not trampled upon. Were the charging party represented by counsel, throughout this entire case, his rights would be duly preserved; whereas, because he has been forced to proceed pro-se and has exhausted himself to futility, both the UBCJA, MRCC and Region 7 seek to take advantage of this fact to trample his rights and the rights of the remaining class to a fair and impartial de-novo hearing before the ALJ, the trier of fact and law to impose a fine in lieu of the make whole remedy which the Act and Board, Appellate Court and Supreme Court precedent demand and require.

In United States v. Selby, No. 07-30183, (9th Cir. 2009) it was held that "the trier of fact is not compelled to accept the self-serving stories of vitally interested defendants." *United States v. Cisneros, 448 F. 2nd 298, 305 (9th Cir. 1971).* The UBCJA, MRCC and their counsel of record and the Region 7 office each have self serving reasons to trample Mr. Johnstons and the class's rights. In the former, it centers on denying the charging party and class the Make Whole Remedy ordered by the ALJ, Paul Bogas. In the latter, it centers on their failure to the Tumey & Ward standard established by the Supreme Court for quasi-judicial federal agencies...." At 1426, "It is settled law that the intent to defraud may be established by circumstantial evidence." *United States v. Milwitt, 475 F. 3rd 1150, 1162 (9th Cir. 2007) (quoting United States v. Rodgers, 321 F. 3d 1226, 1230 (9th Cir. 2003).* 18 USC Sec 1346 (amending fraud statutes to include schemes to deprive another of the "intangible right of honest services"); see *United States v. Bohonus,* 628 F. 2D 1167, 1171 (9TH Cir. 1980)("The requisite' scheme or artifice to defraud' is found in the deprivation of the public's right to honest and faithful government.").

The UBCJA International dictates these policies to its subordinate Regional & District Councils, which implement or carry them out. On the on hand, they claim they are a separate legal entity on paper, so they cannot be bound or tied as a direct party participant and/or agency status and therefore have no legal culpability in the instant matter. The UBCJA has designed and implemented similar programs which shall be implemented on a national scale which maintain all of the core elements present within this case to fine members $500-$1,000 per year, per man and which will allow them to fine/assess members to the tune of $256M-$512M annually. Currently, there are 3-current cases pending before Regions, 1, 22 & 29 which tie directly & squarely to this matter. In order to further that scheme to defraud the membership nationally, the UBCJA has involved the Region 7 attorneys, albeit – unwittingly in their scheme; this case has to first be buried and swept under the rug and wiped from the records via a little known and seldom used Supreme Court case cited as a footnote in Carpenters Local 43 (McDowell Building & Foundation)

and Kevin Lebovitz, 354-122, 12-31-09 slip opinion In re: NLRB, 304 U.S. 486 (1938), which allows the NLRB to wipe out the record of the entire case as though it never existed.

Of course, the UBCJA International and its subordinate Regional & District Councils and their attorneys of record, in dealing with rank and file workers toiling in the constructions industry use their superior legal knowledge (which we pay for) to obfuscate the facts, deny they exist or as a bully pulpit to squash any and all forms of dissent and any & all forms of challenge to their illegal policies when brought before the NLRB. As with the Lebovtiz matter for the Mobility concern, the UBCJA International and their attorneys, in concert with the MRCC fail to account or mention that and case 304 US 486 (1938) was immediately over-ruled by *Ford Motor Company* 305 U.S. 364 (1939).

For the aforementioned reasons stated, we respectfully request that the Motion for Reconsideration be approved by the NLRB & General Counsel after the proper remand to the Board per the mandates of New Process Steel.

Respectfully submitted, for and on behalf of charging party Michael Johnston,

William T. Doherty

WT Doherty
for Michael Johnston
cc: FNE, MT

VIA. U.S.P.O. OVERNIGHT/EXPRESS
11/29/11 GUARANTEED DELIVERY
RETURN RECEIPT

PICKET DUTY

Case Number: 07-CB-15293

Case Docket

Case 07-CB-15293

Hide Activities

Date	Activity
09/26/2011	EOT to 11/30/11 to file motion for reconsideration, ptys srvd (aj)
09/15/2011	CP's (e-mailed) eot req to 11/11/11 to file motion for reconsideration
08/22/2011	EOT TO 9/30/11 TO FILE A MOTION FOR RECONSIDERATION. NO FURTHER EXTS WILL BE GRANTED
08/15/2011	Letter from Michael L Pitt dated 8/9/11 advising he is no longer counsel for Charging party Michael Johnston/ptys srvd/(syh)
07/21/2011	Order/denying the Charging Party's request to reject the Informal Settlement Agreement between the Acting General Counsel and the Respondent/(syh)
07/11/2011	Respondent Michigan Regional Council of Carpenters' E-filed Response to Charging party's Opposition to the Informal Settlement Agreement rec'd ptys srvd (cd)
06/30/2011	E-filed letter from Respondent Union advising they will file an opposition on 7/14/11/ptys srvd/(syh)
05/06/2011	Partial EOT to 6/3/11 to file oppo's to informal settlement agreement. No further eot will be granted, ptys srvd (aj)
04/28/2011	CP's eot req for additional days to file opp's to informal settlement agreement (aj)
03/31/2011	EOT 4/29/11 to file opp's to to informal settlement agreement

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Hide Participants

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"EXHIBIT A"

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Case Documents

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Related Documents

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Document	
ALJ DecisionJD-80-07 , Issued Dec 27 2007 by Paul Bogas	
Board Decision, Volume 352 NLRB No. 119, Page 1016	

Abbreviations

Hide Abbreviations

Abbreviation	Description
ACC	Accepted
ACK'D	Acknowledged
ASST	Assistant
ATTACH	Attachment(s)
ATTMTS	Attachment(s)
BRF	Brief
CNSL	Counsel
CP	Charging Party
DEC	Decision
EMPL'S	Employees
EOT	Extension of Time
EXT	Extension
FM	From
FX	Fax
FXD	Faxed
GC	General Counsel
LTR	Letter
ML	Mail
MLD	Mailed
MTN	Motion
PTYS	Parties
REC'D	Received
RESPS	Respondents
SJ	Summary Judgment
SRVD	Served
SUPP	Supplemental
SVD	Served
W/	With

PICKET DUTY

MRCC - M. JOHNSTON

Employer Involved		
CONVENTION AND SHOW SERVICES INC. FRED TANARI	1250 JOHN A. PAPPAS LINCOLN PARK MI 48146	313-259-7632
Employer Involved MR		
SULLIVAN WARD ASHER & PATTON P C ATTN: DAVID J. SELWOCKI, ESQ.	1000 MACCABEES CENTER 25800 NORTHWESTERN HIGHWAY SOUTHFIELD MI 48075	248-746-0700
ALJ		
NLRB DIVISION OF JUDGES JUDGE PAUL BOGAS	1099 14TH STREET NW ROOM 5400E WASHINGTON DC 20570	202-501-8800
NLRB Region		
NLRB REGION 07 - DETROIT	477 MICHIGAN AVENUE ROOM 300 DETROIT MI 48226	313 - 226-3200

1-16/97 total pgs. (remaining Exhibits)

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June 2, 2011

Via UPS Next-Day Air
Mr. Henry Breiteneicher
Associate Executive Secretary
United States Government
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Re: Local 687, Michigan Regional Council of Carptenters
(Convention & Show Services, Inc.)
Case 7-CB-15293

Dear Mr. Breiteneicher:

Enclosed herewith please find Charging Party's Opposition to Informal Settlement Agreement, as well as Proof of Mailing same, in the above-entitled cause.

Yours truly,

Patricia Giroux

Patricia A. Giroux
Assistant to
MICHAEL L. PITT

/pag
Encl.
cc: Dennis Devaney w/Encl.
Stephen Glasser w/Encl.
Dennis Boren w/Encl.

"EXHIBIT B"

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

LOCAL 687, MICHIGAN REGIONAL
COUNCIL OF CARPENTERS
(CONVENTION & SHOW SERVICES, INC.)

Respondent,

and Case No. 7-CB-15293

MICHAEL JOHNSTON,

Charging Party.

CHARGING PARTY'S OPPOSITION TO INFORMAL SETTLEMENT AGREEMENT

Charging Party Michael Johnston, by and through his attorneys, Pitt, McGehee, Palmer, Rivers & Golden, submits the following as his opposition to informal settlement agreement in this matter:

INTRODUCTION AND BACKGROUND FACTS

1. Charging party Michael Johnston ("Johnston") filed an original Charge on August 9, 2006, and an Amended Charge on September 28, 2006.

2. After the Regional Director of Region 7 issued the complaint against Respondent Local 687, the matter was tried before ALJ Paul Bogas.

3. On December 27, 2007, ALJ Bogas issued his Decision, finding that Respondent Local 687 violated Section 8(b)(1)(A) of the National Labor Relations Act when it discriminated against members who refrained from engaging in Local 687 sponsored picketing activities. (Exhibit 1, Decision, JD-80-07).

4. In addition to a Cease and Desist Order, ALJ Bogas ordered that the

Respondent "must make all discriminatees whole for any resulting loss of earnings and other benefits..." (Exhibit 1, Decision, JD-80-07).

5. On July 31, 2008, a two-member panel of the Board issued a Decision and Order affirming the ALJ's rulings. (Exhibit 2, Decision and Order, *Local 687, Michigan Regional Council of Carpenters (Convention & Show Services, Inc.) and Michael Johnston*, 352 NLRB 119 (July 31, 2008)).

6. On September 20, 2010, the United States Court of Appeals for the District of Columbia Circuit vacated the Order of the Board and remanded the case for further proceedings by the Board.

7. The vacatur of the two-member Board decision was based on the holding of the United States Supreme Court in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), that the Board is authorized to delegate its powers only to a group of three or more members.

7. On February 7, 2011, without Johnston's knowledge or consent, the Regional Director for Region 7 and counsel for Local 687 entered into a settlement of all of Johnston's claims, as well as the approximately 400 unnamed discriminatees in the amount of $300,000.

8. On March 10, 2011, Johnston received a letter from the Regional Director which acknowledged that Johnston, after learning of the settlement, disagreed with its terms and purporting to explain the rationale for the opposed settlement. (Exhibit 3, March 10, 2011 Letter).

APPLICABLE LEGAL STANDARDS

9. Although the Board encourages settlement of labor disputes, it has "no statutory obligation to defer to private settlement agreements; it may defer in its discretion."

NLRB v. International Brotherhood of Electrical Workers, Local Union 112, AFL-CIO, 992 F.2d 990, 992 (9th Cir. 1993) (citing *Airport Parking Management v. N.L.R.B.*, 720 F.2d 610, 614 (9th Cir. 1983).

10. "In exercising its discretion, the Board will refuse to be bound by any settlement agreement that is at odds with the Act or the Board's policies." *Id.* (citing *Independent Stave Co., Inc.*, 287 N.L.R.B. 740, 741 (1987).

11. "In evaluating a settlement to assess whether the purposes and policies underlying the Act would be effectuated by the Board's approving the agreement,

> The Board will examine all the surrounding circumstances including, but not limited to (1) whether the charging party(ies), the respondent(s), and any of the individual discriminate(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violation alleged, the risks inherent in litigation, and the stage of the litigation, (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Id. at 992.

12. At this point in this case, it appears that the first two factors are relevant. Those factors are discussed in Charging Party's argument in opposition to settlement agreement, below.

13. Finally, even though the Regional Director has discretion to enter into settlement agreements, such discretion is not unfettered. The Regional Director may not exercise such discretion in an arbitrary or capricious manner, or in a manner "**lacking in substantial evidentiary support**." *Waverly-Cedar Falls Health Care Center, Inc. v. NLRB*, 933 F.2d 626, 629 (8th Cir. 1991) (emphasis added) (citing *NLRB v. Metal Container Corp.*, 660 F.2d 1309, 1313 (8th Cir. 1981) (applying standard in review of certification of collective

bargaining unit).

ARGUMENT IN OPPOSITION TO SETTLEMENT AGREEMENT

A. The ALJ's Award of Full Make-Whole Relief, Including Backpay, Advanced the Policies of the Board and the Remedial Purposes of the Act

14. In this case, the settlement agreement between the Regional Director and the Respondent, and opposed by Charging Party, is inconsistent with the purposes of the Act and the policies of the Board.

15. In negotiating and agreeing to the settlement, the Regional Director abused his discretion, acted in an arbitrary and capricious fashion, and reached a decision that lacked substantial evidentiary support.

16. The remedies ordered by ALJ Bogas properly advanced the policies of the Board and the purposes of the Act. In cases involving discrimination against union members in violation of the NLRA, "[t]he purpose of awarding a discriminate backpay is to restore him as nearly as possible to the situation he would have been in but for the illegal discrimination." *NLRB v. International Brotherhood of Electrical Workers, Local Union 112, AFL-CIO*, 992 F.2d 990, 992 (9th Cir. 1993) (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

17. In this case, upon finding that Respondent willfully discriminated against Charging Party and other members, ALJ Bogas ordered appropriate make-whole remedies, including backpay. The ALJ ordered that Respondent "[m]ake whole members for any loss of earnings and benefits they may have suffered, as a result of the Respondent's discrimination against them since February 9, 2006, in the manner set forth in the remedy section of this Decision." (Exhibit 1, Decision, p. 9). The remedy section of the ALJ's decision stated: "The Respondent, having discriminatorily denied job referrals to

members, must make all discriminates whole for any resulting loss of earnings and other benefits, computed on a quarterly basis, less any net interim earnings..." *Id.*

18. The remedies ordered by the ALJ, including full back pay, properly advanced the purposes of the Act and policies of the Board, particularly in light of the overwhelming evidence demonstrating that Respondent unlawfully *discriminated against* Charging Party and similarly-situated union members.

B. The Opposed Settlement Is Contrary to and Undermines the Purposes of the Act and the Policies of the Board

19. The settlement reached between the Regional Director and Respondent undermines the purposes of the Act and is contrary to the policies of the Board because the amount of the settlement ($300,000) is woefully inadequate to make all discriminates whole for the loss of earnings and other benefits caused by Respondent's violation of the Act.

20. There are at least 400 discriminatees who suffered a significant loss of earnings and other benefits as a result of Respondent's unlawful discrimination against non-picketers, in violation of the discriminatees' Section 7 rights.

21. The General Counsel has acknowledged that "the monetary portion of the...settlement represents substantially less than a full monetary remedy[.]" Exhibit 4 (Joint Motion of General Counsel and Respondent to Remand Case to Process Informal Settlement Agreement, February 11, 2011, p. 3).

22. In a letter to Charging Party dated March 10, 2011,the Regional Director similarly acknowledged that "[t]his agency is aware that $300,000 represents **much less** than all that is believed to be owed." Exhibit 3 (March 10, 2011 Letter from Regional Director to Charging Party, p. 1) (emphasis added).

23. Enforcement of the opposed settlement would result in woefully inadequate backpay awards to many, if not all, of the 400 discriminatees and would therefore be contrary to the well-founded policy of restoring discriminatees as nearly as possible to the situation they would have been in but for the illegal discrimination.

C. The Opposed Settlement Should Be Rejected Based on All of the Surrounding Circumstances

1. Factor One: Charging Party Has Not Agreed to Be Bound, and the General Counsel Has Not Articulated a Compelling Position in Favor of the Opposed Settlement Agreement

24. There is no dispute that Charging Party Michael Johnston has consistently and adamantly opposed the settlement agreement reached between the Regional Director and Respondent on the grounds that the monetary component of the settlement is not adequate to make whole the 400 or more members who suffered lost earnings and benefits as a result of Respondent's unlawful discrimination. The first factor of the totality of the circumstances analysis therefore requires rejection of the proposed settlement.

25. In response to Charging Party's objections and opposition, the General Counsel has failed to articulate a compelling case in favor of the opposed settlement agreement.

26. General Counsel has acknowledged that "the monetary portion of the...settlement represents **substantially less** than a full monetary remedy[.]" Exhibit 4 (Joint Motion of General Counsel and Respondent to Remand Case to Process Informal Settlement Agreement, February 11, 2011, p. 3) (emphasis added). Similarly, in a letter to Charging Party dated March 10, 2011, the Regional Director acknowledged that "[t]his agency is aware that $300,000 represents **much less** than all that is believed to be owed." Exhibit 3 (March 10, 2011 Letter from Regional Director to Charging Party, p. 1) (emphasis

added).

27. In light of the acknowledged deficiency of the opposed monetary settlement, General Counsel and the Regional Director must come forward with some compelling and specific reasons as to why the proposed settlement agreement should be enforced despite Charging Party's clear opposition.

28. The justifications that have been offered are inadequate to enforce the settlement agreement over Charging Party's opposition. The only purported justifications for the opposed settlement, as set forth in the Regional Director's March 10, 2011 letter to Charging Party (Exhibit 3), are:

a. "[T]he Union's agreement to pay $300,000 appeared to be the most advantageous outcome, under the circumstances. As you are aware, the Board's Decision and Order was vacated on September 20, 2010, as a result of the United States Supreme Court's decision in ***New Process Steel, L.P. v. NLRB***, 130 S.Ct. 2635 (2010);" and

b. "It should be noted that along with the monetary portion of the settlement, the Union entered into some other agreements that contribute to a full remedy of the alleged unfair labor practices in the instant case. They include the Union's reiteration of its recission and the expungement from its written job referral procedures of the provisions that grant priority job referrals to members who engage in picketing sponsored or sanctioned by the Union, which had resulted in the withholding of referrals from members who refused to engage in picketing and other protected activity, and its further agreement that it would not reinstate these procedures or provisions. And the Union agreed to post in conspicuous places copies of the administrative law judge's notice at its office and hiring hall in Detroit, Michigan, for 60 consecutive days."

29. In his letter of March 10, 2011 to Charging Party, the Regional Director further asserted that the General Counsel's Joint Motion to Remand (Exhibit 4) "describes the rationale in support of the settlement[.]"

30. In turn, the only rationale set forth in the Joint Motion is that "[a]lthough the monetary portion of the...settlement represents substantially less than a full monetary

remedy, the Parties agree that it is a reasonable compromise, **in light of the unusual status of the instant case due to the vacatur of the two-member Board decision.**" (Exhibit 4, Joint Motion, ¶ 7) (emphasis added). The highlighted language refers to the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), which means that the Joint Motion (Exhibit 4) does not set forth any additional rationale in support of the opposed settlement, but merely repeats the purported justifications set forth in the Regional Director's letter of March 10, 2011.

31. The justifications offered by the Regional Director and General Counsel in support of the opposed settlement are not compelling for the following reasons:

a. The vacatur of the two-member Board decision does nothing to weaken the factual and legal merits of the case. **The ALJ's adjudication still stands and the discriminatees' claim is just as strong today as it was prior to the Supreme Court's decision in *New Process Steel*.**

b. In fiscal year 2010, "[t]he Regional Offices won 91.0% of Board and Administrative Law Judge unfair labor practice and compliance decisions in whole or in part in [Fiscal Year] 2010." (Exhibit 5, NLRB General Counsel Summary of Operations, January 10, 2011).

c. In the context of settlement evaluation and negotiation, the two-member Board decision is a persuasive point for purposes of evaluating the adequacy of the opposed settlement because two-members of the Board considered the full record of the case as well as the ALJ's decision and voted to affirm the decision and make-whole remedies awarded by the ALJ.

2. Factor 2: The Settlement Is Not Reasonable In Light of the Nature of the Violation, The Risks Inherent In Litigation, and the Stage of the Litigation

32. The evidence in support of the discriminatees' claim is very strong and there is very little risk in presenting this case to a three-member or full Board for review on the merits.

33. The undisputed evidence at trial established that "[t]he challenged job referral procedures explicitly discriminate against members who exercise their Section 7 rights to refrain from Respondent-sponsored picketing, and therefore those procedures violate Section 8(b)(1)(A)." (Exhibit 1, Decision, p. 5).

34. The ALJ's findings of fact on the issue of discrimination against non-picketing members are not disputed and are worth quoting in full for purposes of this Opposition to the Settlement Agreement:

> Indeed, the evidence showed that the Respondent's preference for picketers has meant that the first 80 to 85 percent of referrals go to qualified picketers without any of the non-picketing members even being considered. This is true despite the fact that the picketers comprise only about 20 percent of the members awaiting referral. Obviously a referral procedure that has the effect of reserving the first 80 to 85 percent of job referrals for picketers will tend to coerce members' decisions about whether to engage in picketing. The procedure is discriminatory and falls outside a union's prerogatives in the operation of a nonexclusive hiring hall regardless of whether one casts the Respondent's subjective motivation as rewarding picketers or as punishing non-picketers.

(Exhibit 1, Decision, p. 5).

35. In response to this overwhelming evidence of discrimination, the Respondent argued before the ALJ "that discrimination in referrals at a nonexclusive hiring hall is only unlawful when it targets a specific individual, not a group of individuals." (Exhibit 1, Decision, p. 5).

36. The ALJ properly rejected this argument and noted that the Respondent's argument did not even create a close question of law on the issue of unlawful

discrimination: "The Respondent provides **no authority** to support this proposition, and I am not surprised. A union's discrimination based on members' exercise of their Section 7 rights is not made any more palatable by the fact that it punishes a large number of members, rather than a select few." (Exhibit 1, Decision, p. 5).

37. The ALJ also relied on the strong evidence of *discrimination* in properly rejecting the Respondent's contention that make-whole relief was not a proper remedy because the hiring hall was nonexclusive: "This argument is precluded by Board decisions stating that backpay is the proper remedy when a union unlawfully denies members referrals based on discriminatory reasons, even if the hiring hall is nonexclusive." (Exhibit 1, Decision, p. 7, citing *Development Consultants*, 300 NLRB 479, 480 (1990); *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB at 780).

38. With regard to remedy, ALJ Bogas properly rejected as "contrary to the facts" the Respondent's contention "that an award of make-whole relief would be improper because the General Counsel 'did not present any evidence that members were passed over for a referral,' and a make whole remedy would be 'purely speculative.'" (Exhibit 1, Decision, p. 7 (quoting Respondent's Brief at 9.) The evidence in this case is "clear" that:

> the unlawful preference for picketers meant that [Respondent] passed over qualified members...in order to grant priority to qualified picketers...given the unlawful preference for picketers, the Respondent awarded the first 80 to 85 percent of job referrals to picketers without even considering a single non-picketer. This was true despite the fact that the picketers were a minority—only 20 percent—of the members awaiting referrals. Thus the nexus between the unlawful preference and the denial of job referrals to non-picketers is anything but speculative.

(Exhibit 1, Decision, p. 7).

39. In light of this overwhelming evidence of unlawful *discrimination* in the operation of Respondent's hiring hall, ALJ Bogas properly rejected the Respondent's argument that there was no violation of the Act because it operated a *non-exclusive* hiring

hall. *See* Exhibit 1, Decision, p. 5p. 4 & n. 5 (citing *Teamsters Local 460 (Superior Asphalt*), 300 NLRB 441 fn.1 (1990) and *Newspaper & Mail Deliverers (City & Suburban Delivery*) 332 NLRB at 870 fn. 1)). Accordingly, there is very little "inherent risk" of reversal on the merits on this issue if the case were presented to a three-member of full Board for review of ALJ Bogas's decision on the merits.

40. The inherent risks of litigation/stage of litigation factor does not support the settlement. This is not a case where, for purposes of settlement review, the Board is "confronted only with *alleged* violations of the Act" (see, e.g., *Independent Stave Co., Inc.*, 287 N.L.R.B. No. 76 (December 16, 1987). On the contrary, this is a case where the discriminatees' claim is supported by overwhelming evidence that convinced both ALJ Bogas and the two-member Board that the Respondent violated Section 8(b)(1)(A) of the Act and that make-whole relief was necessary to remedy the discriminatory denial of job referrals to members who exercised their Section 7 rights. (Exhibit 1, Decision, p. 9, citing *F.W. Woolworth Co.*, 90 NLRB 289 (1950)).

41. As discussed above, the Supreme Court's decision in *New Process Steel*, and the resulting vacatur of the two-member Board decision, does not provide any substantive support or foundation for the decision to abandon this case in exchange for an inadequate financial settlement, for the following reasons:

a. The evidence in support of the discriminatees' case is very strong.

b. The Respondent Union does not have a credible defense to the case.

c. The case has already been tried and resolved in favor of the discriminates and the Board would not have to "reinvent the wheel" in order to present the same case, on the merits, to a three-member or full Board for review.

d. The Regional Director and General Counsel have not articulated any specific

factual or legal bases in support of their assertions to Charging Party that the Supreme Court's decision undermines the legal or factual strength of the case, nor does it explain why this case would be jeopardized if it were presented to a three-member or full Board for review on the merits.

e. The Regional Director and General Counsel have not explained with any specific factual or legal basis why the Supreme Court's decision in *New Process Steel* favors a settlement at such an inadequate financial amount for a large group of discriminatees who were injured by Respondent's unlawful actions.

42. Charging Party's opposition to the proposed settlement is well founded, in part, because the Respondent has sufficient liquid assets to furnish make-whole relief and the Regional Director apparently did not engage in any analysis of either the actual economic damages at issue for all discriminatees or of the Respondent's exposure and ability to satisfy a judgment and proper make-whole remedy.

43. In *NLRB v. International Brotherhood of Electrical Workers, Local Union 112, AFL-CIO*, 992 F.2d 990, 992 (9th Cir. 1993), the Court of Appeals for the Ninth Circuit held that the discriminates "gave a legitimate reason for the withdrawal" of their approval of settlement because on "the evening of the first day of the hearing, they examined some Union financial statements, and concluded that the Union was in a far stronger financial position than it had represented during the settlement discussions." *Id.* at 993.

44. In this case, financial records available through the NLRB show that in 2010, the Respondent maintained sufficient assets to provide adequate make-whole relief to all discriminatees. (Exhibit 6, Form LM-2 Labor Organization Annual Report, p. 3).

45. In this case, the Regional Director did not estimate the value of the make whole remedy ordered and the union's ability to pay the award before agreeing to settle all

potential claims for $300,000. The Regional Director's decision to settle the matter was arbitrary because it was not based on evidence.

46. The Charge in this matter was filed in August 2006. The damage period at issue is from February 2006 to March of 2007, or 13 months of wage loss for the discriminatees, including Charging Party. One discriminate alone could have lost as much as $60,000 to $70,000 in that 13 month damage period. The parties have conservatively estimated that there are 400 discriminatees who suffered damages. Thus, even if the average loss is $10,000, the total make whole remedy would be $4 million.

47. Under all of the surrounding circumstances, it is not reasonable to settle this matter for a fraction of value of case if the Respondent is able to pay entire make whole remedy. Respondent has $8m in liquid assets per the LMM reports (Johnston will supply these). The record is devoid of any indication of due diligence on the part of the Regional Director. Neither exposure nor ability to pay estimates were performed by the Regional Director prior to agreeing to settle the cases of all discriminatees $300,000.

48. Reasonable steps to estimate the respondent's exposure could have been carried out quickly and economically. For instance, the potential pool of victims could have been sent questionnaires. Charging party has identified a number of beneficiaries of this illegal referral program. A sample of the earnings during the 13 month loss period of the favorites could have been compared with a sample of the earnings of those disfavored by the program. The Regional Director did not make any assessment of whether the Union could pay all or some of the entire make whole remedy without financially impairing the Union.

49. As part of his opposition to the proposed settlement, Charging Party has expressed a desire to be involved in the calculation of damages to be award and to assist

in indentifying those who are entitled to backpay awards. However, Charging Party has not been asked to assist in calculating damages or determining who should receive how much of the award. Moreover, it does not appear that the Regional Director has involved any other discriminatee or Union member in the calculation and distribution of settlement funds.

50. There are no safeguards in place to ensure that beneficiaries of the illegal union referral program are not improperly compensated or that the victims of the referral policy are not excluded from an award.

For the foregoing reasons, Charging Party Michael Johnston, by and through his attorneys, Michael L. Pitt and Kevin Carlson, respectfully requests that opposed informal settlement be rejected and that the Board should order the Regional Director to negotiate a settlement reflecting an evidence-based make-whole remedy or proceed to fully adjucdicate the matter so that an evidence-based make-whole remedy can be fashioned by an Adminstrative Law Judge based on the proven violation of the Act, the damages suffered by the discriminatees and the totality of the surrounding circumstances.

Respectfully Submitted,

PITT, McGEHEE, PALMER,
RIVERS & GOLDEN, P.C.

By: _____

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DATED: June 2, 2011

Local 687, Michigan Regional Council of Carpenters (Convention & Show Services, Inc.) *and* Michael Johnston. Case 7–CB–15293

July 31, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On December 27, 2007, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel also filed a cross-exception and supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the udge's rulings, findings, and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law udge and orders that the Respondent, Local 687, Michigan Regional Council of Carpenters, Detroit, Michigan, its officers, agents, and representatives shall take the action set forth in the Order.

Judith A. Champa, Esq., for the General Counsel.
Jeffrey D. Wilson, Esq. and *Dennis M. Devaney, Esq. (Strobl & Sharp, P.C.)*, of Bloomfield Hills, Michigan, and *Nicholas R. Nahat, Esq. (Novara Tesija & McGuire, P.L.L.C.)*, of Southfield, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Detroit, Michigan, on October 22, 2007. Michael Johnston, an individual, filed the original charge on August 9, 2006, and an amended charge on September 28, 2006. The Regional Director of Region 7 of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on February 9, 2007. The complaint alleges that Local 687, Michigan Regional Council of Carpenters (the Respondent) violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) in the operation of its nonexclusive hiring hall by maintaining written referral procedures that discriminate against members who refrain from engaging in Respondent-sponsored picketing and other protected activity. The Respondent filed a timely answer in which it denied having committed any of the violations alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law

FINDINGS OF FACT

I. JURISDICTION

Convention & Show Services, Inc., a corporation, is an exposition contractor with a place of business in Detroit, Michigan. It annually derives gross revenues in excess of $500,000 and purchases and receives at its Michigan facility, goods and supplies valued in excess of $50,000 directly from points outside the State of Michigan. The Respondent admits, and I find, that Convention & Show Services is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Referral Procedures

The Respondent is a labor organization with an office and place of business in Detroit, Michigan. It operates a hiring hall from which it refers out-of-work members to contracting employers, including Convention & Show Services, Inc. The contracts between the Respondent and those employers provide that the Respondent is a nonexclusive source of referrals—meaning that the Respondent's members may seek obs with, and potentially be hired by, any employer without being referred by the Respondent. The Respondent, and its membership, acted in 1996, and again in April 2007, to ratify and maintain written procedures that govern these referrals. Under those procedures, an out-of-work member who wants to be referred by the Respondent registers by completing and submitting a card. The Respondent numbers those cards consecutively, in the order they are received, and places them in the "out-of-work box." When an employer asks the Respondent to refer an individual or individuals, the Respondent will generally begin by offering the referral to the qualified individual with the lowest number in the out-of-work box, and then will proceed to the qualified individual with the next lowest number, and so on, until the number of workers requested by the employer has been reached. Members who work a specified number of hours after submitting a card are no longer considered to be out-of-work and their cards are removed from the box. If such individuals want to be referred in the future, they must reregister and obtain a new out-of-work number.

The written referral procedures create a few significant exceptions to the general procedure of offering referrals to quali-

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3 (b) of the Act.

[2] The General Counsel urges that the Board's "current practice of awarding only simple interest on backpay and other monetary awards be replaced with the practice of compounding interest." Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. *Tech Valley Printing, Inc.*, 352 NLRB No. 81 fn. 5 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

"EXHIBIT C"

fied members in the order that their cards entered the out-of-work box. The complaint alleges that two of the exceptions are unlawful. The challenged exceptions modify the consecutive referral procedures based on a member's participation in, or refusal to participate in, Respondent-sponsored picketing and other protected activity. Those exceptions state as follows:

> Paragraph 4(c). Refusal to participate in organized activities such as picketing, hand billing, etc. will also qualify for removal [from the out-of-work box].
>
> Paragraph 7. Except for referrals under agreements which establish that the Local Union is to be the exclusive source of employment, the out-of-work box shall be used to call individuals for picket duty and individuals who are serving as pickets shall be granted first preference on referrals to available employment in the order that they are in the out-of-work box.

The Respondent maintained and enforced paragraph 7 starting no later than February 9, 2006. On about March 1, 2007, after the complaint in this case issued, the Respondent ceased enforcement of paragraph 7. The Respondent has not enforced the other challenged provision—paragraph 4(c)—for at least the past 5 years, and the record does not show that that paragraph was ever enforced. However, the Respondent has not removed either of the challenged provisions from the written procedures. In the past, copies of the written procedures were posted at the referral hall and those written procedures are currently available in the Detroit office of the Michigan Regional Council of Carpenters (MRCC), the Respondent's governing body.[1] There are 10 other locals operating under the auspices of the MRCC, and all of those locals have ratified the referral procedures.

For over 5 years, Nick McCreary, an agent of the Respondent,[2] has been the person with responsibility for operating the Respondent's out-of-work referral system. McCreary, the only witness in this case, credibly testified about the operation of that system. He stated that, on average, there are about 500 individuals with cards in the out-of-work box,[3] of whom about 100 are picketers. The cards of members who engage in Respondent-sponsored picketing are moved to the front of the out-of-work box. When an employer asks the Respondent to refer potential employees, McCreary begins by offering the referrals to qualified picketers with cards in the out-of-work box, without regard to whether there is a qualified nonpicketer who has been out-of-work longer and holds the next referral number.[4] The Respondent only extends referral offers to the nonpicketers if there are not enough qualified picketers to satisfy the employer's request. In most cases, all of the persons referred by the Respondent are picketers. According to McCreary, approximately 80 to 85 percent of the time the Respondent finds enough persons to refer from among the qualified picketers and does not reach the nonpicketers with cards in the out-of-work box. Although paragraph 7 of the referral procedure states that picketing employees "shall be granted first preference on referrals to available employment in the order that they are in the out-of-work box," McCreary testified that, in practice, the Respondent refers individuals who have been engaging in a great deal of picketing over picketers who would have priority based on their referral numbers, but who have not picketed as much. Once a picketer obtains work using the picketing preference, the preference is extinguished, and the next time the individual seeks a ob referral, he or she must engage in picketing again in order to obtain a preference. During McCreary's tenure operating the referral system he has never exhausted the cards in the out-of-work box, meaning that there have always been more members waiting for referrals than there have been available referrals.

Contracting employers have the right to refuse employment to persons referred by the Respondent. However, approximately 90 percent of the time the employers hire the referred individuals and retain them for the full term of the pro ect. Even when a contracting employer refuses employment to a referred individual, that employer is required to pay the re ected individual for 2 hours work.

B. The Complaint

The complaint alleges that, since about February 9, 2006, the Respondent has violated Section 8(b)(1)(A) of the Act in the operation of its nonexclusive hiring hall by maintaining written employment referral procedures that grant priority to its members who engage in Respondent-sponsored picketing, and withhold referrals from its members who refuse to engage in such picketing, for the purpose of encouraging members to engage in protected activities on behalf of the Respondent and to discourage members from exercising their Section 7 right to refrain from engaging in such activities.

III. ANALYSIS AND DISCUSSION

The Board has held that a union violates Section 8(b)(1)(A) of the Act in the operation of a nonexclusive hiring hall when it discriminatorily denies referrals to members because those members have engaged in activities protected by Section 7 of the Act. *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174 (2000); *Newspaper & Mail Deliverers (City & Suburban Delivery)*, 332 NLRB 870, 870 fn. 1 (2000); *Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500, 500 fn. 2 (1993), enfd. mem. 16 F.3d 404 (3d Cir. 1993); *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB 777, 780 (1984), enfd.

[1] Other, unchallenged, portions of the referral rules provide that the Respondent may offer referrals without regard to numerical order when placing a union steward or when an employer makes a written request for a particular individual. There was also testimony that some employers supply the Respondent with "do not hire lists," and that the Respondent will not refer an individual to an employer who has placed that individual on such a list, regardless of whether that individual is the next qualified member in the out-of-work box.

[2] In the answer to the complaint, the Respondent admitted that McCreary was its agent within the meaning of Section 2(13) of the Act.

[3] McCreary testified that the number varies over time. At the time of trial, the number of cards in the out-of-work box had swelled to about 700, but at other times the number of cards has dropped to as low as 200.

[4] McCreary makes these offers by phone. Approximately 70 percent of the time that he calls someone to offer a referral, that individual is not present and does not return the call in time to obtain the referral. This failed-contact rate is the same for picketers and nonpicketers.

782 F.2d 1030 (3d Cir. 1986) (Table). Such discrimination is unlawfully coercive in the context of nonexclusive hiring halls, despite the fact that the coercion is greater when the discriminating union is party to an exclusive hiring arrangement. *Teamsters Local 923 (ellow Cab Co.)*, 172 NLRB 2137, 2138 (1968).[5] The protections provided by Section 7 extend not only to a member's decision to participate in union activities, but also to a member's decision to *refrain* from union activities, including union-sponsored picketing. *Service Employees District 1199 (Staten Island University Hospital)*, 339 NLRB 1059, 1060–1061 (2003); *District 65, Distributive Workers (Blume Associates, Inc.)*, 214 NLRB 1059 (1974); see also *Service Employees Local 87 (Able Building Maintenance Co.)*, 349 NLRB 408, 412 (2007) ("An essential element of any violation of Section 8(b)(1) is restraint or coercion in the exercise of a Section 7 right; i.e., the right to form, oin, or assist a labor organization, or to refrain from such activity.").

The record establishes that the Respondent ratified and maintained written procedures stating that individuals who refuse to engage "in organized activities such as picketing, hand billing, etc.," qualify for removal from consideration for ob referrals and that individuals who do participate in Respondent-sponsored picketing will be granted first preference for receiving ob referrals. For a number of years, the Respondent gave effect to the preference for picketers, and only ceased to do so after the Board issued the complaint in this case. The challenged ob referral procedures explicitly discriminate against members who exercise their Section 7 rights to refrain from Respondent-sponsored picketing, and therefore those procedures violate Section 8(b)(1)(A).

The Respondent offers a number of arguments for why this discrimination based on participation in picketing activity should not be considered a violation of the Act. First, it argues that the cases holding that discrimination in referrals from nonexclusive hiring halls violate the Act are inapplicable here because those cases involve discrimination against a particular dissident union member, whereas this case involves the grant of a preference to a group of individuals. According to the Respondent, the first of those situations is of a "completely different character" from the second. The Respondent contends that absent discrimination targeting a particular individual, the manner of referral by unions has not been regulated by the Board in the context of nonexclusive hiring halls. (R. Br. at 6–7.) The Respondent has not shown that this distinction is recognized by the Board or the Courts and, in my view, the distinction is not a meaningful one. By referring picketers who would not have received the referrals except for the preference, the Respondent is denying referrals to qualified nonpicketers who have been waiting longer and thus possess lower referral numbers. To put it another way, when the Respondent is parceling out a limited number of ob referrals to a larger number of members, it cannot reward some for engaging in picketing activity without punishing others for exercising their Section 7 rights to refrain from such activity. Indeed, the evidence showed that the Respondent's preference for picketers has meant that the first 80 to 85 percent of referrals go to qualified picketers without any of the nonpicketing members even being considered. This is true despite the fact that the picketers comprise only about 20 percent of the members awaiting referral. Obviously a referral procedure that has the effect of reserving the first 80 to 85 percent of ob referrals for picketers will tend to coerce members' decisions about whether to engage in picketing. The procedure is discriminatory and falls outside a union's prerogatives in the operation of a nonexclusive hiring hall regardless of whether one casts the Respondent's sub ective motivation as rewarding picketers or as punishing nonpicketers. See *Service Employees Local 1107 (Sunrise Hospital)*, 347 NLRB 63, 65 (2006), citing *Boilermakers Local 686 (Boiler Tube)*, 267 NLRB 1056, 1057 (1983) (Where a union interferes with a member's Section 7 right to refrain from union activity, Section 8(b)(1)(A) does not require a showing of motivation or intent to establish a violation.).

I re ect the Respondent's suggestion that discrimination in referrals at a nonexclusive hiring hall is only unlawful when it targets a specific individual, not a group of individuals. The Respondent provides no authority to support this proposition, and I am not surprised. A union's discrimination based on members' exercise of their Section 7 rights is not made any more palatable by the fact that it punishes a large number of members, rather than a select few. Moreover, the condemnation of such discrimination in the distribution of ob opportunities has not been limited to instances when the Section 7 activity involved a member's intraunion dissidence or political activity, but rather has extended to circumstances in which the refusal to refer is based on legitimate union interests. See, e.g., *Newspaper & Mail Deliverers (City & Suburban Delivery)*, 332 NLRB 870, 870 fn. 1 and 876 (assuming referral system is nonexclusive, union violates Section 8(b)(1)(A) by refusing to recommend members for employment because those members refrained from participation in a strike).[6]

The Respondent argues that one of the two referral provisions at issue—paragraph 4(c)—can be interpreted to apply to activities not covered by Section 7 and, in any case, has not

[5] The Respondent cites *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 441 (1990), for the proposition that "absent an exclusive hiring hall arrangement, a union's failure to operate its hiring hall in accordance with ob ective criteria is not a violation of the Act" since "a union operating a nonexclusive hiring procedure lacks the power to put obs out of the reach of workers." R. Br. at 6. Although in that case the Board held that a union has no duty of fair representation in the nonexclusive hiring hall setting, the Board explicitly stated that *discrimination* in referrals at a nonexclusive hall is still a violation of Sec. 8(b)(1)(A). 300 NLRB at 441 fn. 1 (A union operating a nonexclusive hiring hall violates Sec. 8(b)(1)(A) when it "denies a member a referral in retaliation for the employees' participation in protected activity."); see also *Newspaper & Mail Deliverers (City & Suburban Delivery)*, 332 NLRB at 870 fn. 1 (even though union has no duty of fair representation in the operation of a nonexclusive referral system, the union violates Sec. 8(b)(1)(A) when it refuses to refer individuals in retaliation for their protected activity).

[6] As the General Counsel recognizes, in the context of "conduct that the union can regulate internally in furtherance of legitimate union interests" discrimination may be permissible if it does not "affect[ ] members' employment opportunities based on Section 7 considerations." GC Br. at 14. The Respondent's discrimination in the distribution of employment referrals, however, affects members' employment opportunities.

been enforced. As set forth above, paragraph 4(c) states that an individual qualifies for removal from the out-of-work referral system if he or she "refus[es] to participate in organized activities such as picketing, hand billing, etc." The Respondent contends that this provision can apply to Respondent-organized activities, such as charitable events, which do not implicate Section 7 rights. Even assuming that the provision can be interpreted to reach some unprotected activity, that would not change the fact that it explicitly reaches other activity, such as refusal to participate in picketing, which is undoubtedly protected by Section 7. Such coercion is unlawful regardless of whether the provision also has lawful applications. The Respondent's defense that it did not enforce paragraph 4(c), is also not viable. The mere existence of a rule that improperly discriminates on the basis of a member's protected activity has a chilling effect on the exercise of Section 7 rights, and violates Section 8(b)(1)(A) regardless of whether the provision has ever been enforced. *Awrey Bakeries,* 335 NLRB 138, 139–140 (2001), enfd. 59 Fed. Appx. 690 (6th Cir. 2003); *Engineers & Scientists Guild (Lockheed-California)*, 268 NLRB 311 (1983).

In its brief, the Respondent also contends that the challenged referral policies were implemented by the MRCC, and applied by MRCC business representative McCreary, not by the Respondent (identified in the complaint as "Local 687, MRCC"). Accordingly, it argues, no violation by the Respondent has been established. I conclude that this defense is precluded by the answer to the complaint, in which the Respondent admitted that it "maintained" the challenged referral procedures in "the operation of its nonexclusive hiring hall," and that McCreary was its agent within the meaning of Section 2(13) of the Act. The Respondent never moved to amend its answer in either of those two respects. Moreover, the evidence showed that, in fact, the Respondent acted to accept and maintain the unlawful referral rules on two occasions, most recently in April 2007. Thus, whatever the involvement of the MRCC as a discrete entity, the Respondent itself adopted and maintained the unlawful referral procedures that its agent, McCreary, enforced at its hiring hall.

CONCLUSIONS OF LAW

1. The Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. Since February 9, 2006, the Respondent violated Section 8(b)(1)(A) of the Act in the operation of its nonexclusive hiring hall by maintaining written referral procedures that discriminate against members who refrain from engaging in Respondent-sponsored picketing and other protected activities.

REMEDY

Much of the briefing in this case concerns the question of whether make-whole relief—and in particular backpay—is an appropriate remedy. The complaint seeks the conventional make-whole remedy, but the Respondent contends that such a remedy is not available. First, the Respondent argues that backpay may not be awarded because the General Counsel only alleges a violation of Section 8(b)(1)(A), not Section 8(b)(2). This argument is contrary to controlling Board precedent, which holds that backpay is an appropriate remedy for violations of Section 8(b)(1)(A). *Development Consultants*, 300 NLRB 479, 480 (1990); *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB at 780.[7] Similarly, the Respondent argues that make-whole relief is not available given that the hiring hall was nonexclusive and therefore the discriminatory preference in referrals did not mean that members were "prohibited from going directly to the contractors themselves." This argument is precluded by Board decisions stating that backpay is the proper remedy when a union unlawfully denies members referrals based on discriminatory reasons, even if the hiring hall is nonexclusive. Id. The opportunities that discriminatees had to find employment without the assistance of the Respondent may be addressed when interim earnings and mitigation efforts are considered in a compliance proceeding.

The Respondent also contends that an award of make-whole relief would be improper because the General Counsel "did not present any evidence that members were passed over for a referral," and a make-whole remedy would be "purely speculative." (R. Br. at 9.) This contention is contrary to the facts. McCreary's testimony made clear that the unlawful preference for picketers meant that he passed over qualified members who had been registered in the out-of-work system longer, and had lower referral numbers, in order to grant priority to qualified picketers. The evidence showed that, given the unlawful preference for picketers, the Respondent awarded the first 80 to 85 percent of ob referrals to picketers without even considering a single nonpicketer. This was true despite the fact that the picketers were a minority—only 20 percent—of the members awaiting referrals. Thus the nexus between the unlawful preference and the denial of ob referrals to nonpicketers is anything but speculative. It is true that the record does not identify specific nonpicketers to whom the referrals were discriminatorily denied. However, the Board has held that in cases involving a union's unlawful failure to refer members it is appropriate to defer to compliance the question of who is in the class of victims. *Electrical Workers Local 48 (Oregon-Columbia Chapter of NECA)*, 342 NLRB 101, 109 (2004); *Electrical Workers Local 724 (Albany Electrical Contractors)*, 327 NLRB 730 (1999); *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109, 142–143 (1995), enfd. mem. 139 F.3d 906 (9th Cir. 1998).

The Respondent also argues that an order for make-whole relief would be unduly speculative because contracting employers were not required to hire the persons who the Respondent referred. This argument is specious. The contracting employers

[7] The Respondent suggests that the General Counsel is improperly attempting an "end run around" the established proof requirements by alleging a violation of Sec. 8(b)(1)(A), rather than Sec. 8(b)(2). R. Br. at 9. However, the Board has stated that Sec. 8(b)(1)(A)—not Sec. 8(b)(2)—is the appropriate provision for consideration of allegations of union discrimination in the operation of a hiring hall where, as here, the hiring hall is nonexclusive. *Carpenters Local 626*, 310 NLRB at 500; *Development Consultants*, 300 NLRB at 480. A union violates Sec. 8(b)(2) when it discriminates in the operation of an exclusive hiring hall or when it causes an employer to discriminate against employees. Id. Thus, the General Counsel and the complaint invoke the appropriate provision.

were required to pay each referred member for a minimum of 2 hours work, regardless of whether the employer chose to hire that individual or not. Thus nonpicketers who were discriminatorily denied referrals lost, at a minimum, the 2-hours pay that would have been guaranteed to them had they been referred by the Respondent. Moreover, since the contracting employers hired 90 percent of those referred by the Respondent, the losses suffered by persons who were discriminatorily denied referrals was generally much greater than the 2-hour minimum. Given the evidence presented in this case, I conclude that the Respondent's contention that the loss of earnings resulting from the discrimination was unduly speculative is without merit.

The Respondent relies on the decision of the United States Supreme Court in *Sure-Tan*, 467 U.S. 883 (1983), to support its argument that the Board's conventional make-whole remedy is too speculative in this case. That reliance is misplaced. The remedy that was invalidated in *Sure-Tan* set a minimum backpay entitlement in lieu of the calculation of discriminatees' actual losses. The General Counsel is not seeking such a remedy here, but rather requests the conventional remedy under which backpay will only be provided for actual losses that are calculated in a subsequent compliance proceeding. In *Sure-Tan*, the Court not only did not preclude the conventional remedy as too speculative, but explicitly approved of it. 467 U.S. at 902 ("We generally approve . . . the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculation as to the amounts of backpay, if any, due these employees."). The Respondent's citation to the Board's decision in *Page Litho*, 313 NLRB 960 (1994), is similarly unpersuasive. In that case, the respondent was an employer that violated Section 8(a)(5) by unilaterally ceasing to provide a union with notification of ob openings. The General Counsel sought backpay and the Board denied the request based on the absence of discrimination, the nonexclusive nature of the hiring arrangement, and the fact that the employer was not required to hire individuals referred by the union. The Board explicitly distinguished cases, such as the instant one, in which backpay is appropriate because a union discriminated in the operation of its nonexclusive hiring hall. Id. at 962, discussing *Development Consultants*, supra. In the instant case, not only was the denial of referrals discriminatory, but when a discriminatee was denied such a referral he or she lost at least the guaranteed minimum 2-hours pay. Thus the decisions, such as *Development Consultants*, 300 NLRB at 480, and *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB at 780, which provide that backpay is an appropriate remedy for a union's unlawful discrimination in the operation of a nonexclusive hiring hall, are controlling here, not *Page Litho*.

The General Counsel urges that the Board's "current practice of awarding only simple interest on backpay and other monetary awards be replaced with the practice of compounding interest." (GC Br. at 24.) The Board has considered, and rejected, this argument for a change in its practice. See *Rogers Corp.*, 344 NLRB 504 (2005), citing *Commercial Erectors, Inc.*, 342 NLRB 940 fn. 1 (2004), and *Accurate Wire Harness*, 335 NLRB 1096 fn. 1 (2001), enfd. 86 Fed. Appx. 815 (6th Cir. 2003). If the General Counsel's argument in favor of compounding interest has merits, those merits are for the Board to consider, not me. I am bound to follow Board precedent on the subject. See *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993). *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

Having found that the Respondent violated the Act as alleged in the complaint, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that paragraphs 4(c) and 7 of the Respondent's written out-of-work referral procedures unlawfully discriminate against members on the basis of their Section 7 activity, those paragraphs must be rescinded and stricken from the Respondent's written referral procedures. The Respondent must also refrain from maintaining or enforcing those provisions or in any other way considering a member's participation in picketing activity sponsored by the Respondent when distributing ob referrals to members. The Respondent, having discriminatorily denied ob referrals to members, must make all discriminatees whole for any resulting loss of earnings and other benefits, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Local 687, Michigan Regional Council of Carpenters, Detroit, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining, enforcing, and/or giving effect to written ob referral procedures that grant priority or preference to members who engage in picketing that is sponsored or sanctioned by the Respondent, and which withhold referrals from members who refuse to engage in picketing and other protected activity.

(b) Giving any consideration to members' participation in, or failure to participate in, Respondent-sponsored or sanctioned picketing when offering ob referrals to members.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind, and strike from its written ob referral procedures, the provisions that grant priority ob referrals to members who engage in picketing sponsored or sanctioned by the Respondent, and which withhold referrals from members who refuse to engage in picketing and other protected activity.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

-CONT.-

2. "ORDER"

NOTE: #22,471M vs. #300K

(b) Make whole members for any loss of earnings and benefits they may have suffered, as a result of the Respondent's discrimination against them since February 9, 2006, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all hiring hall records, all documentation regarding the Respondent's referral of members for employment, all documentation regarding compensation and employment obtained by members, all documents reporting or recording the participation of members in Respondent-sponsored picketing, all referral cards, and any other documents, including an electronic copy of such records if stored in electronic form, necessary to identify those who suffered loss of employment because of the violations found herein and/or to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its union office and hiring hall in Detroit, Michigan, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members or applicants for referral are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, oin, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain, enforce, or give effect to ob referral procedures that give priority or preference to members who engage in picketing that we sponsor or sanction, and which withhold referrals from members who refuse to engage in picketing and other protected activity.

WE WILL NOT give any consideration to whether you have participated in, or refrained from participation in, picketing that we sponsored or sanctioned when offering ob referrals to members.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind, and strike from our written ob referral procedures, provisions that grant priority ob referrals to members who engage in picketing that we sponsor or sanction, and which withhold referrals from members who refuse to engage in picketing and other protected activity.

WE WILL make you whole for any loss of earnings and benefits that you may have suffered as a result of our discrimination since February 9, 2006, with interest.

LOCAL 687, MICHIGAN REGIONAL COUNCIL OF CARPENTERS

[9] If this Order is enforced by a udgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NEW PROCESS STEEL, L. P. *v.* NATIONAL LABOR RELATIONS BOARD

certiorari to the united states court of appeals for the seventh circuit

No. 08-1457. Argued March 23, 2010--Decided June 17, 2010

The Taft-Hartley Act increased the size of the National Labor Relations Board (Board) from three members to five, see 29 U. S. C. §153(a), and amended §3(b) of the National Labor Relations Act to increase the Board's quorum requirement from two members to three and to allow the Board to delegate its authority to groups of at least three members, see §153(b). In December 2007, the Board--finding itself with only four members and expecting two more vacancies--delegated, *inter alia,* its powers to a group of three members. On December 31, one group member's appointment expired, but the others proceeded to issue Board decisions for the next 27 months as a two-member quorum of a three-member group. Two of those decisions sustained unfair labor practice complaints against petitioner, which sought review, challenging the two-member Board's authority to issue orders. The Seventh Circuit ruled for the Government, concluding that the two members constituted a valid quorum of a three-member group to which the Board had legitimately delegated its powers. ***Held:*** **Section 3(b) requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board. Pp. 4-14.**

(a) The first sentence of §3(b), the so-called delegation clause, authorizes the Board to delegate its powers only to a "group of three or more members." This clause is best read to require that the delegee group *maintain* a membership of three in order for the delegation to remain valid. First, that is the only way to harmonize and give meaningful effect to all of §3(b)'s provisions: (1) the delegation clause; (2) the vacancy clause, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board"; (3) the Board quorum requirement, which mandates that "three members of the Board shall, at all times, constitute a quorum of the Board"; and (4) the group quorum provision, which provides that "two members shall constitute a quorum" of any delegee group. This reading is consonant with the Board quorum requirement of three participating members "at all times," and it gives material effect to the delegation clause's three-member rule. It also permits the vacancy clause to operate to provide that vacancies do not impair the Board's ability to take action, so long as the quorum is satisfied. And it does not render inoperative the group quorum provision, which continues to authorize a properly constituted three-member delegee group to issue a decision with only two members participating when one is disqualified from a case. The Government's contrary reading allows two members to act as the Board *ad infinitum*, dramatically undercutting the Board quorum requirement's significance by allowing its permanent circumvention. It also diminishes the delegation clause's three-member requirement by permitting a *de facto* two-member delegation. By allowing the Board to include a third member in the group for only one minute before her term expires, this approach also gives no meaningful effect to the command implicit in both the delegation clause and the Board quorum requirement that the Board's full power be vested in no fewer than three members. Second, had Congress intended to authorize two members to act on an ongoing basis, it could have used straightforward language. The Court's interpretation is consistent with the Board's longstanding practice of reconstituting a delegee group when one group member's term expired. Pp. 4-9.

(b) The Government's several arguments against the Court's interpretation--that the group quorum requirement and vacancy clause together permit two members of a three-member group to constitute a quorum even when there is no third member; that the vacancy clause establishes that a vacancy in the *group* has no effect; and that reading the statute to authorize the Board to act with only two members advances the congressional objective of Board efficiency--are unconvincing. Pp. 9-14.

564 F. 3d 840, reversed and remanded.

Stevens, J., delivered the opinion of the Court, in which *Roberts, C. J.,* and *Scalia, Thomas,* and *Alito, JJ.,* joined. *Kennedy, J.,* filed a dissenting opinion, in which *Ginsburg, Breyer,* and *Sotomayor, JJ.,* joined.

NEW PROCESS STEEL, L. P., PETITIONER *v.*
NATIONAL LABOR RELATIONS BOARD

EXHIBIT "B"

on writ of certiorari to the united states court of appeals for the seventh circuit

[June 17, 2010]

Justice Stevens **delivered the opinion of the Court.**

The Taft-Hartley Act, enacted in 1947, increased the size of the National Labor Relations Board (Board) from three members to five. See 29 U. S. C. §153(a). Concurrent with that change, the Taft-Hartley Act amended §3(b) of the National Labor Relations Act (NLRA) to increase the quorum requirement for the Board from two members to three, and to allow the Board to delegate its authority to groups of at least three members. See §153(b). The question in this case is whether, following a delegation of the Board's powers to a three-member group, two members may continue to exercise that delegated authority once the group's (and the Board's) membership falls to two. We hold that two remaining Board members cannot exercise such authority.

I

As 2007 came to a close, the Board found itself with four members and one vacancy. It anticipated two more vacancies at the end of the year, when the recess appointments of Members Kirsanow and Walsh were set to expire, which would leave the Board with only two members--too few to meet the Board's quorum requirement, §153(b). The four sitting members decided to take action in an effort to preserve the Board's authority to function. On December 20, 2007, the Board made two delegations of its authority, effective as of midnight December 28, 2007. First, the Board delegated to the general counsel continuing authority to initiate and conduct litigation that would normally require case-by-case approval of the Board. See Minute of Board Action (Dec. 20, 2007), App. to Brief for Petitioner 4a-5a (hereinafter Board Minutes). Second, the Board delegated "to Members Liebman, Schaumber and Kirsanow, as a three-member group, all of the Board's powers, in anticipation of the adjournment of the 1st Session of the 110th Congress." *Id.*, at 5a. The Board expressed the opinion that its action would permit the remaining two members to exercise the powers of the Board "after [the] departure of Members Kirsanow and Walsh, because the remaining Members will constitute a quorum of the three-member group." *Ibid.*

The Board's minutes explain that it relied on "the statutory language" of §3(b), as well as an opinion issued by the Office of Legal Counsel (OLC), for the proposition that the Board may use this delegation procedure to "issue decisions during periods when three or more of the five seats on the Board are vacant." *Id.*, at 6a. The OLC had concluded in 2003 that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." Dept. of Justice, OLC, Quorum Requirements, App. to Brief for Respondent 3a. In seeking the OLC's advice, the Board agreed to accept the OLC's answer regarding its ability to operate with only two members, *id.*, at 1a, n. 1, and the Board in its minutes therefore "acknowledged that it is bound" by the OLC opinion. Board Minutes 6a. The Board noted, however, that it was not bound to make this delegation; rather, it had "decided to exercise its discretion" to do so. *Ibid.*

On December 28, 2007, the Board's delegation to the three-member group of Members Liebman, Schaumber, and Kirsanow became effective. On December 31, 2007, Member Kirsanow's recess appointment expired. Thus, starting on January 1, 2008, Members Liebman and Schaumber became the only members of the Board. They proceeded to issue decisions for the Board as a two-member quorum of a three-member group. The delegation automatically terminated on March 27, 2010, when the President made two recess appointments to the Board, because the terms of the delegation specified that it would be revoked when the Board's membership returned to at least three members, *id.*, at 7a.

During the 27-month period in which the Board had only two members, it decided almost 600 cases. See Letter from Elena Kagan, Solicitor General, to William K. Suter, Clerk of Court (Apr. 26, 2010). One of those cases involved petitioner New Process Steel. In September 2008, the two-member Board issued decisions sustaining two unfair labor practice complaints against petitioner. See *New Process Steel, LP*, 353 N. L. R. B. No. 25 (2008); *New Process Steel, LP*, 353 N. L. R. B. No. 13 (2008). Petitioner sought review of both orders in the Court of Appeals for the Seventh Circuit, and challenged the authority of the two-member Board to issue the orders.

The court ruled in favor of the Government. After a review of the text and legislative history of §3(b) and the sequence of events surrounding the delegation of authority in December 2007, the court concluded that the then-sitting two members constituted a valid quorum of a three-member group to which the Board had legitimately delegated all its powers. 564 F. 3d 840, 845-847 (CA7 2009). On the same day that the Seventh Circuit issued its decision in this case, the Court of Appeals for the District of Columbia announced a decision coming to the opposite conclusion. *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F. 3d 469 (2009). We granted certiorari to resolve the conflict.[1] 558 U. S. ___ (2009).

II

The Board's quorum requirements and delegation procedure are set forth in §3(b) of the NLRA, 49 Stat. 451, as amended by 61 Stat. 139, which provides:

"The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. ... A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." 29 U. S. C. §153(b).

It is undisputed that the first sentence of this provision authorized the Board to delegate its powers to the three-member group effective on December 28, 2007, and the last sentence authorized two members of that group to act as a quorum of the group during the next three days if, for example, the third member had to recuse himself from a particular matter. **The question we face is whether those two members could continue to act for the Board as a quorum of the delegee group after December 31, 2007, when the Board's membership fell to two and the designated three-member group of "Members Liebman, Schaumber, and Kirsanow" ceased to exist due to the expiration of Member Kirsanow's term. Construing §3(b) as a whole and in light of the Board's longstanding practice, we are persuaded that they could not.**

The first sentence of §3(b), which we will call the delegation clause, provides that the Board may delegate its powers only to a "group of three or more members." 61 Stat. 139. There are two different ways to interpret that language. One interpretation, put forward by the Government, would read the clause to require only that a delegee group contain three members at the precise time the Board delegates its powers, and to have no continuing relevance after the moment of the initial delegation. Under that reading, two members alone may exercise the full power of the Board so long as they were part of a delegee group that, at the time of its creation, included three members. The other interpretation, by contrast, would read the clause as requiring that the delegee group *maintain* a membership of three in order for the delegation to remain valid. Three main reasons support the latter reading.

First, and most fundamentally, reading the delegation clause to require that the Board's delegated power be vested continuously in a group of three members is the only way to harmonize and give meaningful effect to all of the provisions in §3(b). See *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (declining to adopt a "construction of the statute, [that] would render [a term] insignificant"); *Market Co.* v. *Hoffman*, 101 U. S. 112, 115-116 (1879) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be ... insignificant" (internal quotation marks omitted)). Those provisions are: (1) the delegation clause; (2) the vacancy clause, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board"; (3) the Board quorum requirement, which mandates that "three members of the Board shall, at all times, constitute a quorum of the Board"; and (4) the group quorum provision, which provides that "two members shall constitute a quorum" of any delegee group. See §153(b).

Interpreting the statute to require the Board's powers to be vested at all times in a group of at least three members is consonant with the Board quorum requirement, which requires three participating members "at all times" for the Board to act. The interpretation likewise gives material effect to the three-member requirement in the delegation clause. The vacancy clause still operates to provide that vacancies do not impair the ability of the Board to take action, so long as the quorum is satisfied. And the interpretation does not render inoperative the group quorum provision, which still operates to authorize a three-member delegee group to issue a decision with only two members participating, so long as the delegee group was properly constituted. Reading §3(b) in this manner, the statute's various pieces hang together--a critical clue that this reading is a sound one.

The contrary reading, on the other hand, allows two members to act as the Board *ad infinitum*, which dramatically undercuts the significance of the Board quorum requirement by allowing its permanent circumvention. That reading also makes the three-member requirement in the delegation clause of vanishing significance, because it allows a *de facto* delegation to a two-member group, as happened in this case. Under the Government's approach, it would satisfy the statute for the Board to include a third member in the group for only one minute before her term expires; the approach gives no meaningful effect to the command implicit in both the delegation clause and in the Board quorum requirement that the Board's full power be vested in no fewer than three members. Hence, while the Government's reading of the delegation clause is textually permissible in a narrow sense, it is structurally implausible, as it would render two of §3(b)'s provisions functionally void.

Second, and relatedly, if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language. Congress instead imposed the requirement that the Board delegate authority to no fewer than three members, and that it have three participating members to constitute a quorum. Those provisions are at best an unlikely way of conveying congressional approval of a two-member Board. Indeed, had Congress wanted to provide for two members alone to act as the Board, it could have maintained the NLRA's original two-member Board quorum provision, see 29 U. S. C. §153(b) (1946 ed.), or provided for a delegation of the Board's authority to groups of two. **The Rube Goldberg-style**

delegation mechanism employed by the Board in 2007--delegating to a group of three, allowing a term to expire, and then continuing with a two-member quorum of a phantom delegee group--is surely a bizarre way for the Board to achieve the authority to decide cases with only two members. To conclude that Congress intended to authorize such a procedure to contravene the three-member Board quorum, we would need some evidence of that intent.

The Government has not adduced any convincing evidence on this front, and to the contrary, our interpretation is consistent with the longstanding practice of the Board. This is the third factor driving our decision. Although the Board has throughout its history allowed two members of a three-member group to issue decisions when one member of a group was disqualified from a case, see Brief for Respondent 20; Board Minutes 6a, the Board has not (until recently) allowed two members to act as a quorum of a defunct three-member group.[2] Instead, the Board concedes that its practice was to reconstitute a delegee group when one group member's term expired. Brief for Respondent 39, n. 27.[3] That our interpretation of the delegation provision is consistent with the Board's longstanding practice is persuasive evidence that it is the correct one, notwithstanding the Board's more recent view. See *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 214 (1988).

In sum, a straightforward understanding of the text, which requires that no fewer than three members be vested with the Board's full authority, coupled with the Board's longstanding practice, points us toward an interpretation of the delegation clause that requires a delegee group to maintain a membership of three.

III

Against these points, the Government makes several arguments that we find unconvincing. It first argues that §3(b) authorizes the Board's action by its plain terms, notwithstanding the somewhat fictional nature of the delegation to a three-member group with the expectation that within days it would become a two-member group. In particular, the Government contends the group quorum requirement and the vacancy clause together make clear that when the Board has delegated its power to a three-member group, "any two members of that group constitute a quorum that may continue to exercise the delegated powers, regardless whether the third group member ... continues to sit on the Board" and regardless "whether a quorum remains in the full Board." Brief for Respondent 17; see also *id.*, at 20-23.

Although the group quorum provision clearly authorizes two members to act as a quorum of a "group designated pursuant to the first sentence"--*i.e.*, a group of at least three members--it does not, by its plain terms, authorize two members to constitute a valid delegee group. **A quorum is the number of members of a larger body that must participate for the valid transaction of business. See Black's Law Dictionary 1370 (9th ed. 2009) (defining "quorum" as the "minimum number of members ... who must be present for a deliberative assembly to legally transact business"); 13 Oxford English Dictionary 51 (2d ed. 1989) ("A fixed number of members of any body ... whose presence is necessary for the proper or valid transaction of business"); Webster's New International Dictionary 2046 (2d ed. 1954) ("Such a number of the officers or members of any body as is, when duly assembled, legally competent to transact business").** But the fact that there are sufficient members participating to constitute a quorum does not necessarily establish that the larger body is properly constituted or can validly exercise authority.[4] In other words, that only two members must participate to transact business in the name of the group, does not establish that the group itself can exercise the Board's authority when the group's membership falls below three.

The Government nonetheless contends that quorum rules "ordinarily" define the number of members that is both necessary and sufficient for an entity to take an action. Brief for Respondent 20. Therefore, because of the quorum provision, if "at least two members of a delegee group actually participate in a decision ... that should be the end of the matter," regardless of vacancies in the group or on the Board. *Ibid.* But even if quorum provisions ordinarily provide the rule for dealing with vacancies--*i.e.*, even if they ordinarily make irrelevant any vacancies in the remainder of the larger body--the quorum provisions in §3(b) do no such thing. Rather, there is a separate clause addressing vacancies. The vacancy clause, recall, provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." §153(b) (2006 ed.). **We thus understand the quorum provisions merely to define the number of members who must participate in a decision, and look to the vacancy clause to determine whether vacancies in excess of that number have any effect on an entity's authority to act.**

The Government argues that the vacancy clause establishes that a vacancy in the *group* has no effect. But the clause speaks to the effect of a vacancy in the *Board* on the authority to exercise the powers of the *Board;* it does not provide a delegee group authority to act when there is a vacancy in the group. It is true that any vacancy in the group is necessarily also a vacancy in the Board (although the converse is not true), and that a group exercises the (delegated) "powers of the Board." But §3(b) explicitly distinguishes between a group and the Board throughout, and in light of that distinction we do not think "Board" should be read

to include "group" when doing so would negate for all practical purposes the command that a delegation must be made to a group of at least three members.

Some courts have nonetheless interpreted the quorum and vacancy provisions of §3(b) by analogizing to an appellate panel, which may decide a case even though only two of the three initially assigned judges remain on the panel. See *Photo-Sonics, Inc.* v. *NLRB*, 678 F. 2d 121, 122-123 (CA9 1982). The governing statute provides that a case may be decided "by separate panels, each consisting of three judges," 28 U. S. C. §46(b), but that a "majority of the number of judges authorized to constitute a court or panel thereof ... shall constitute a quorum," §46(d). We have interpreted that statute to "requir[e] the inclusion of at least three judges in the first instance," but to allow a two-judge "quorum to proceed to judgment when one member of the panel dies or is disqualified." *Nguyen* v. *United States*, 539 U. S. 69, 82 (2003). But §46, which addresses the assignment of particular cases to panels, is a world apart from this statute, which authorizes the standing delegation of all the Board's powers to a small group.[5] Given the difference between a panel constituted to decide particular cases and the creation of a standing panel plenipotentiary, which will decide many cases arising long after the third member departs, there is no basis for reading the statutes similarly. Moreover, our reading of the court of appeals quorum provision was informed by the longstanding practice of allowing two judges from the initial panel to proceed to judgment in the case of a vacancy, see *ibid.*, and as we have already explained, the Board's practice has been precisely the opposite.

Finally, we are not persuaded by the Government's argument that we should read the statute to authorize the Board to act with only two members in order to advance the congressional objective of Board efficiency. Brief for Respondent 26. In the Government's view, Congress' establishment of the two-member quorum for a delegee group reflected its comfort with pre-Taft-Hartley practice, when the then-three-member Board regularly issued decisions with only two members. *Id.*, at 24. But it is unsurprising that two members regularly issued Board decisions prior to Taft-Hartley, because the statute then provided for a Board quorum of two. See 29 U. S. C. §153(b) (1946 ed.). Congress *changed* that requirement to a three-member quorum for the Board. As we noted above, if Congress had wanted to allow the Board to continue to operate with only two members, it could have kept the Board quorum requirement at two.[6]

Furthermore, if Congress had intended to allow for a two-member Board, it is hard to imagine why it would have limited the Board's power to delegate its authority by requiring a delegee group of at least three members. Nor do we have any reason to surmise that Congress' overriding objective in amending §3(b) was to keep the Board operating at all costs; the inclusion of the three-member quorum and delegation provisions indicate otherwise. Cf. Robert's Rules of Order §3, p. 20 (10th ed. 2001) ("The requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons").

IV

In sum, we find that the Board quorum requirement and the three-member delegation clause should not be read as easily surmounted technical obstacles of little to no import. Our reading of the statute gives effect to those provisions without rendering any other provision of the statute superfluous: The delegation clause still operates to allow the Board to act in panels of three, and the group quorum provision still operates to allow any panel to issue a decision by only two members if one member is disqualified. Our construction is also consistent with the Board's longstanding practice with respect to delegee groups.

We thus hold that the delegation clause requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board.

We are not insensitive to the Board's understandable desire to keep its doors open despite vacancies.[7] **Nor are we unaware of the costs that delay imposes on the litigants.** If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances. **Section 3(b), as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died.**

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.